

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO.  
AMD-04-029

WILLIE MITCHELL,  
SHELTON HARRIS,  
SHELLY WAYNE MARTIN,  
SHAWN GARDNER,

Defendants

(Motions Hearing)  
Thursday, May 15, 2008  
Baltimore, Maryland

Before: Honorable Andre M. Davis, Judge

Appearances:

On Behalf of the Government:  
Robert Harding, Esquire  
On Behalf of Defendant Mitchell:  
Laura Kelsey Rhodes, Esquire  
Michael E. Lawlor, Esquire  
On Behalf of Defendant Harris:  
Gerard P. Martin, Esquire  
Paul Flannery, Esquire  
On Behalf of Defendant Martin:  
Thomas L. Crowe, Esquire  
James G. Pyne, Esquire  
On Behalf of Defendant Gardner:  
Adam H. Kurland, Esquire  
Barry Coburn, Esquire

Reported by:  
Mary M. Zajac, RPR  
Room 3515, U.S. Courthouse  
101 West Lombard Street  
Baltimore, Maryland 21201

1 (Proceedings at 10:25 a.m.)

2 THE COURT: Counsel, I trust that you got word that I  
3 canceled yesterday's proceeding sufficiently in advance to make  
4 good use of the free time you had yesterday, perhaps to go to the  
5 game. But be that as it may, we're ready to proceed.

6 I've gotten the correspondence from Mr. Crowe and Mr.  
7 Harding and Mr. Hanlon. And I agree with the government. My  
8 focus today was going to be on the issue of rap music and rap  
9 lyrics. But I will take up your issues before we conclude today,  
10 Mr. Crowe.

11 MR. CROWE: Thank you, Your Honor.

12 THE COURT: Unless there are any preliminary matters, I  
13 think we're ready to proceed. How do you wish to proceed, Mr.  
14 Harding?

15 MR. HARDING: Well, Your Honor, this issue has been  
16 briefed and even argued previously.

17 THE COURT: Yes.

18 MR. HARDING: The Court has ruled on Track 11. I  
19 submitted a draft of the transcript of excerpts, including Track  
20 11, but also many other, several other songs. As I said in the  
21 cover letter, I think if you played this straight through, it  
22 would come to only about 10 or 12 minutes. So I've tried to pare  
23 this down as much as possible.

24 All counsel have had copies of the entirety of these  
25 songs, as well as many other songs on a couple of other CD's that

1 we don't intend to use in evidence, for a long time now. So I  
2 think that the appropriate procedure now would be for defense  
3 counsel to offer any arguments they have for why the other  
4 excerpts, apart from Track 11, which the Court has already ruled  
5 on, are not in furtherance of the conspiracy.

6 THE COURT: Well, I think we need to actually play the  
7 recordings here in court. Are you prepared to do that? I  
8 appreciate --

9 MR. HARDING: I'm sorry. I wasn't prepared for that,  
10 Your Honor. But the agent says he can go get them.

11 THE COURT: Okay. Well, I have the --

12 MR. HARDING: You have them?

13 THE COURT: I have the disk that you sent me. I  
14 listened to some of it. But I just couldn't listen to much more  
15 than a couple minutes. And of course, you provided the draft  
16 transcripts. Perhaps counsel don't need to have it played.

17 MR. HARDING: They have the CD's, Your Honor.

18 THE COURT: They have the CD's. And presumably they've  
19 heard and/or read the lyrics. So perhaps that's not necessary.

20 But if you could just focus me. I've already ruled on  
21 Track 11. And you've provided that as an attachment to your  
22 letter, with the draft transcript. Correct?

23 MR. HARDING: Yes, Your Honor.

24 THE COURT: Of Track 11.

25 MR. HARDING: Yes, Your Honor. It's the first four

1 pages.

2 THE COURT: First four pages. And then next you  
3 identify, I take it, Track 19.

4 MR. HARDING: Right.

5 THE COURT: Final verse, you say.

6 MR. HARDING: Yes. I skipped to the end of the song,  
7 basically.

8 THE COURT: Okay. And what is the parens 20 on Page 5  
9 of your draft transcript? What does that signify?

10 MR. HARDING: Paren 20? I'm looking for it. I don't  
11 see that on my --

12 THE COURT: Okay. My law clerk just whispered to me  
13 that, in fact, apparently, Track 19, as you identified on the  
14 draft lyrics, is actually Track 20.

15 MR. HARDING: Oh. I'm sorry about that, Your Honor. I  
16 noticed when I copied the CD's on to new CD's, that a couple of  
17 the songs got reversed. And I thought I caught the two that got  
18 reversed. But there must have been another flip-flop in there  
19 that I didn't catch.

20 THE COURT: I see. Okay. So my law clerk has  
21 identified what you say is Track 19 as Track 20, what you say as  
22 Track 2 is actually Track 3, and what you say is Track 8 is  
23 actually Track 9.

24 MR. HARDING: Well, okay.

25 THE COURT: And furthermore, what you say is Track 18

1 is actually Track 19.

2 MR. HARDING: That will be true for the copies sent to  
3 the Court. But defense counsel --

4 THE COURT: But not for the others?

5 MR. HARDING: -- will have the track numbers that are  
6 on here.

7 THE COURT: Great. Okay. So do you propose to play  
8 all of the excerpts for which you provided the draft transcripts?

9 MR. HARDING: Yes, Your Honor.

10 THE COURT: Is that your proposal? Okay. Well, I  
11 don't know that just because I've ruled on Track 11 that that  
12 satisfies your burden as to the other tracks. So I need to hear  
13 from you. And we can use the draft transcript unless counsel,  
14 again, want any of the excerpts played.

15 MR. HARDING: Okay. I'm happy --

16 THE COURT: Tell me. Let's start with Track 19. Why  
17 is that --

18 MR. HARDING: If I could say in general, Your Honor.

19 THE COURT: Okay.

20 MR. HARDING: I think all of these songs have three  
21 themes to them that are in furtherance of the conspiracy. One is  
22 to intimidate both rivals, the people who are beefing with the  
23 down, a phrase that appears several times in these songs, the  
24 people who are involved in this sort of dispute that led to  
25 several of the murders in this case.

1           The government's theory of the case is that the  
2 McCappity Brown murders were connected to a beef that arose  
3 between the Rice organization and Mr. Mitchell and his  
4 associates. And so there is an ongoing theme to intimidate these  
5 rivals.

6           There's also an ongoing theme to intimidate snitches or  
7 people who might be inclined to cooperate or talk to Homicide.  
8 And that's another recurrent theme in Track 11, as well as the  
9 other songs.

10           Another theme is sort of a kind of boastful recitation  
11 of the accomplishments of the down, bragging about murders  
12 they've committed, often talking about the characteristic type of  
13 murder this group committed, which was shooting people in the  
14 head. There are a great many references to brains and eyes and  
15 things like that, because the murders in this case, all four of  
16 the first murders in this case were by shots to the head. "Nine  
17 to the dome" is one of the phrases that appears in this first  
18 song.

19           THE COURT: Referring now to Track 19?

20           MR. HARDING: No. Track 11, actually.

21           THE COURT: Okay.

22           MR. HARDING: I'll get to Track 19, if I may,  
23 specifically in a moment. But the other theme I wanted just to  
24 mention, if I could, in a general way, is that there's an effort  
25 to sort of solidify the solidarity of the soldiers of this

1 organization with the leaders of the organization, sort of to  
2 build the collective fervor of the organization.

3 And in my pleading in this case that I submitted a long  
4 time ago, it's Paper Number 221, I go through four of the Fourth  
5 Circuit cases on in-furtherance, the Lewis, Howard, Shores and  
6 Stokes cases and quote the language that supports the admission  
7 of coconspirator statements on grounds similar to the ones that  
8 I've just been talking about.

9 On Page 6 I quoted language from a case called United  
10 States v. Flynn, which is actually an Eighth Circuit case. It is  
11 also clear that statements are in furtherance when they are,  
12 quote, "made to pull the troops together and provide renewed  
13 fervor among members of the conspiracy."

14 So with that said, Track 19, you will notice about 10  
15 lines down, it says, "It's just me, Weaze and Bo." This is Mr.  
16 Harris singing at this time. So he's --

17 THE COURT: Yeah. Before we get deep into the lyrics,  
18 let me have you refresh my recollection.

19 First of all, just refresh my recollection as to the  
20 issue of authenticity, both with respect to authorship, to the  
21 extent that that is known or relevant, and with respect to actual  
22 performance, recording of the actual recordings.

23 And if you would, just say a word or two about when and  
24 how they were produced and/or marketed.

25 One of the -- I didn't listen to all of them. I didn't

1 even listen to the entirety of any of the excerpts. But among  
2 those I listened to, it appeared to be a live performance. There  
3 was clapping and short of actual performance of a rap song, there  
4 was like an introduction. So it created in my mind the image of  
5 an actual performance such that this was a live recording of a  
6 performance.

7 So if you could just fill in those gaps with me with  
8 respect generally. And then I'd like to know with respect to  
9 each of the excerpts you propose to play, if you have that at  
10 your fingertips.

11 MR. HARDING: Okay. These songs all come from a single  
12 CD.

13 THE COURT: A single CD?

14 MR. HARDING: Yes.

15 THE COURT: Okay.

16 MR. HARDING: It was produced sometime in late April or  
17 May of 2003, something we know about from the internal factual  
18 evidence in these songs. We know that it had to occur after Mr.  
19 Mitchell and Mr. Martin were locked up for the Wyche brothers  
20 murders, which happened in April of 2003.

21 THE COURT: Do you have -- and I don't mean to suggest  
22 by my questions, I'm just trying to get as much information from  
23 you as I can. Do you have documentation of production --

24 MR. HARDING: No.

25 THE COURT: I don't know anything about the music



1 business. But do you have any documentation at all?

2 MR. HARDING: The label on the CD is Sheistyville,  
3 which is the label we know is associated to Mr. Mitchell.

4 What we have in the way of business documentation are  
5 the Articles of Incorporation of Shake Down Entertainment, which  
6 is the production company for Sheistyville, which is the name of  
7 the label that they use on the CD's. Mr. Mitchell incorporated  
8 this company.

9 THE COURT: Okay. You don't have a witness, though, I  
10 take it, an engineer or producer or someone that one would expect  
11 to be involved in the production, however sophisticated or  
12 unsophisticated, actual production of the CD's?

13 MR. HARDING: No. We have witnesses who will testify  
14 about how these guys went to a certain studio.

15 THE COURT: Okay.

16 MR. HARDING: Rap.

17 THE COURT: It will be an identified studio?

18 MR. HARDING: Yes. It's a studio, in fact, if my  
19 memory serves me, on North Avenue.

20 THE COURT: Okay. All right. And were these CD's  
21 generally available for sale, either street sale or --

22 MR. HARDING: Yes. We have witnesses who will testify  
23 that these defendants themselves sold copies of the CD's. And we  
24 have witnesses who bought copies of the CD's from these  
25 defendants.

1           We also know that they performed at local night clubs.  
2           We have fliers that we can introduce into evidence. And we have  
3           witnesses who know that this happened.

4           We also know that their music was broadcast by radio.  
5           We have witnesses who will testify that there's a certain radio  
6           station here in Baltimore that plays this kind of music a lot.  
7           And these defendants managed to get their songs played on this  
8           radio station.

9           THE COURT: Okay. Now, when you say "these  
10          defendants" --

11          MR. HARDING: Actually, the key people are Mr. Harris  
12          and Mr. Mitchell. Weaze is mentioned in many of these songs but  
13          he's not one of the rappers. In fact, Mr. Mitchell is not one of  
14          the rappers.

15          THE COURT: Okay.

16          MR. HARDING: It's even mentioned in one of these  
17          songs, even though they talk about Bo all the time, they point  
18          out that he's not a rapper.

19          THE COURT: Am I right that Bo is Mr. Gardner's  
20          nickname?

21          MR. HARDING: No. That's Goo. Bo is Mr. Mitchell.

22          THE COURT: Bo is Mr. Mitchell, Goo is Mr. Gardner?

23          MR. HARDING: Yeah.

24          THE COURT: Okay.

25          MR. HARDING: I don't think I agree with the Court's

1 view that this was a live performance, this particular --

2 THE COURT: Oh, I'm not saying it was. I'm just saying  
3 that's the way it sounded on the tape.

4 MR. HARDING: I think they staged it to make it seem  
5 like that. And the last track features Mr., this last excerpt  
6 that I propose to play, Track 20, is Mr. Harris talking about the  
7 next CD they're going to produce. So it actually does create the  
8 impression that he's talking to a group of people.

9 But I don't think that's, in fact, what's going on. I  
10 think they're producing this in a studio and they're simply  
11 talking to whoever's listening to their CD's.

12 THE COURT: Okay. But there was clapping on one of the  
13 --

14 MR. HARDING: There's a lot of clapping and there's a  
15 lot of clacking of guns and cocking of guns and that sort of  
16 thing.

17 THE COURT: I heard that on Track 11, of course. But  
18 literally, there is clapping, there's audience response. Now,  
19 maybe it was recorded and then put into the CD. But what I heard  
20 was something in the nature of an introduction. And then maybe  
21 it was after the song or before the song, there was applause. So  
22 as I say, it created the image of a live performance in some  
23 venue.

24 MR. HARDING: Well, I guess I have to qualify what I  
25 said. I don't remember that. But it could well be, of course,

1 that they recorded one of their live performances and then copied  
2 it on to the CD. Or it could be that they simply dubbed in the  
3 clapping noise when they were producing the song, just as they  
4 dubbed in a lot of other things.

5 THE COURT: Okay. So the actual rapper in all of these  
6 is Mr. Harris, you say?

7 MR. HARDING: No. It's usually Mr. Harris. I would  
8 say that 75 or 80% of the singing in these songs is Mr. Harris.

9 THE COURT: And how would you prove that?

10 MR. HARDING: Oh, I have witnesses who know his voice.

11 THE COURT: Okay. All right.

12 MR. HARDING: He identifies himself, actually, as Hard  
13 Rock frequently. That's Mr. Harris's name, Hard Rock or Rock.

14 THE COURT: Hard Rock or Rock. Okay.

15 MR. HARDING: Also, Your Honor, you may recall that  
16 when the search warrant was executed on Mr. Harris's apartment at  
17 this, in this case, a large stack of song lyrics was recovered in  
18 Mr. Harris's handwriting. And his name appears on many, many  
19 pages of these.

20 He is the author of an enormous volume of rap song  
21 lyrics, which we intend also to use in evidence as admissions by  
22 Mr. Harris.

23 THE COURT: As apart, separate and apart from the  
24 actual --

25 MR. HARDING: Apart from this. Although there is, of

1 course, overlap. Much of the, much of the recorded songs are, we  
2 have the written lyrics from Mr. Harris, from his apartment.

3 THE COURT: Okay.

4 MR. HARDING: In terms of authenticity, I guess the  
5 answer is that we can identify the voices who are singing these  
6 songs. Not only Mr. Harris, but we can identify the other  
7 voices. The other voices include people like a guy named Mark  
8 Herbert, who was TM. He's often called TM in these songs because  
9 his street name was Tony Montana.

10 THE COURT: Is he a coconspirator?

11 MR. HARDING: We believe he is a coconspirator, Your  
12 Honor. And apparently, the defendants do, too. He's frequently  
13 talked about in these songs.

14 There's one other guy who sings a little bit, named  
15 Slow. And I can't remember what his real name is. But he's just  
16 one of the rappers in this crew.

17 But as I say, about 75 to 80% of the singing on the  
18 tracks that the government proposes to use in evidence is Mr.  
19 Harris singing. That's the most valuable stuff from the  
20 government's point of view.

21 THE COURT: All right. And who is Weaze?

22 MR. HARDING: Weaze is Mr. Martin.

23 THE COURT: Okay.

24 MR. HARDING: We have many witnesses who will testify  
25 that that is his street name. In fact, when he filled out an

1 information form for the Homicide detectives, when he was  
2 arrested in the, in the Wyche brothers murder, he gave that as an  
3 alternate name, Weaze.

4 So Mr. Harris sings in Track 19, "It's just me, Weaze  
5 and Bo, back to back, with niggas bobbing and weaving, one of  
6 your blows." He's talking about their ongoing struggle with this  
7 other organization.

8 THE COURT: I'm sorry, Mr. Harding. Will you have  
9 either an expert -- and we may have gone over this when I ruled  
10 on Track 11, so forgive me. But will you have either an expert,  
11 which I assume you won't, or a coconspirator or a knowledgeable  
12 aficionado in the rap music industry to interpret or  
13 transliterate any of this?

14 MR. HARDING: Well, my original intention -- I think I  
15 stated this in a pleading at one point -- was that I would try to  
16 get an expert in rap lyrics and rap jargon. But I think I'm  
17 going to just use coconspirators and case agents to accomplish  
18 what I need to do in that.

19 THE COURT: All right. Now, I would imagine a case  
20 agent or any investigator could do what appears to have been  
21 done, and that is to extract or extrapolate from the lyrics  
22 descriptions of actual murders. I mean, that's basically your  
23 position here, right? That these songs were written about actual  
24 murders, in part, at least?

25 MR. HARDING: Well, there are numerous references to

1 specific murders but there are also just references to that being  
2 one of the general ways that they operate.

3 THE COURT: Okay. That goes to your  
4 intimidation/enforcement point. But there's no mention of the  
5 Wyches by name here, is there?

6 MR. HARDING: No.

7 THE COURT: Okay. But I take it your position is that  
8 there will be descriptives included in the lyrics that an  
9 investigator and/or some other witness and/or by inference one  
10 can infer, yeah, they're talking about something that actually  
11 happened, based on other evidence?

12 MR. HARDING: Absolutely, Your Honor. A good example  
13 of that is on Page 4.

14 THE COURT: Okay.

15 MR. HARDING: Where it talks about "Lyle's party, when  
16 it all went down, I wasn't there but if I was, it would have been  
17 more clowns stabbed and dragged out of the club, gagged and  
18 bagged, best believe we gonna chase y'all down and shake y'all  
19 down."

20 THE COURT: But that's Track 11.

21 MR. HARDING: Yes.

22 THE COURT: Okay. I've already ruled on that. See,  
23 again, I'm not going to revisit Track 11.

24 MR. HARDING: Okay.

25 THE COURT: And I'm just trying to, again, as I said a

1 few minutes ago, just because I've admitted Track 11 and just  
2 because as a general matter some rap songs may be very much like  
3 Track 11, I want to deal with it on a track-by-track basis.

4 MR. HARDING: Okay.

5 THE COURT: I think I have to.

6 MR. HARDING: Okay. Well, Track 19 features this  
7 language where --

8 THE COURT: And by the way -- I'm sorry I keep  
9 interrupting -- I think, in fact, clearly what you're going to  
10 need to do, and your word processor can do this for you, I know,  
11 you're going to have to number the lines.

12 MR. HARDING: Okay.

13 THE COURT: Because from what you've told me already  
14 and from what I recall about Track 11, there is likely to be,  
15 almost certain to be direct and/or cross examination of witnesses  
16 regarding the meaning of words, the meaning of phrases. And so  
17 the jury's going to have to be able to find words and phrases.  
18 And the only way you can do that is to say, look at Lines 21  
19 through 23. Okay?

20 So please be sure to, when you prepare the final  
21 transcript, use the function that will number each line so that  
22 we can talk about it more easily.

23 But go ahead. You were about to point to a line in  
24 Track 19 on Page 5.

25 MR. HARDING: Yes. This language where it says "It's



1 just me, Weaze and Bo, back to back, with niggas bobbing and  
2 weaving, one of your blows. Now it's cracking, nigga, I hope  
3 God's guarding your soul. I ain't just rapping, nigga. Trying  
4 to figure someone out."

5 This is -- "Cause them niggas quick to tap the trigger.  
6 We in a hurry cause we really wanna get at this nigga. My nigga  
7 Bo's a looney tune. Just ask a nigga. This shit's about to  
8 balloon. We gotta grab this nigga. When we hit 'em, we hit 'em  
9 hard. We don't be jabbing niggas. Every heater you just got, we  
10 done had it, nigga. Sooner or later, nigga, we'll be living  
11 lavish, nigga."

12 This is talking about the ongoing beef that they're  
13 having with the Rice organization and it's an attempt to boast  
14 about how it's going to balloon. It's going to, they're going to  
15 triumph. They're going to grab this nigga. And we hit him hard.

16 So the government's position is that this is intended  
17 to, primarily to intimidate their enemies in this ongoing sort of  
18 beef that they have with the Rice organization.

19 THE COURT: And will you have a witness, one or more  
20 witnesses who will essentially say what you just said?

21 MR. HARDING: Yes.

22 THE COURT: About these lyrics?

23 MR. HARDING: Yes.

24 THE COURT: All right. And are there any, if you  
25 recall, because, obviously, one of the things that struck the

1 Court in respect to Track 11 was the use of sound effects, the  
2 gunshots and that kind of thing. Is any of that on Track 19? If  
3 you recall.

4 MR. HARDING: I can't say specifically about Track 19.  
5 It's often in the other songs.

6 THE COURT: Okay.

7 MR. HARDING: But I can't say that I recall  
8 specifically about Track 19.

9 THE COURT: All right. So let's go to Track 2 on Page  
10 6. Generally, what does this song relate to?

11 MR. HARDING: This songs relates to drug dealing by the  
12 organization in Park Heights, and how the cops are trying to stop  
13 them from making money, which they need for their beef with the  
14 down. See, it ends there with, "When it's beef with the Down,  
15 you niggas know what I'm spraying."

16 Down is, of course, Shakedown Entertainment. And the  
17 claim here is they're complaining partly that the cops are  
18 harassing them from selling drugs in Park Heights.

19 THE COURT: Now, I did hear Park Heights mentioned in  
20 part of what I listened to. But I don't see it in this  
21 particular excerpt. I don't see a specific mention. Am I  
22 missing it? Talking about Track 2.

23 MR. HARDING: Well, I can tell you -- first off, Park  
24 Heights is mentioned at the end of the previous track, on Track  
25 19. That may be what you're referring to.

1 THE COURT: Oh, yes.

2 MR. HARDING: First of all, Your Honor, we're going to  
3 have witnesses who will testify that Sheistyville means Park  
4 Heights. That's what the label of these songs refers to.

5 THE COURT: Really?

6 MR. HARDING: Yes.

7 THE COURT: Hmm.

8 MR. HARDING: The block, you see where it says "Me and  
9 Narni on the block with pills rocking and flowing?"

10 THE COURT: Yeah.

11 MR. HARDING: "Cops posted on the block trying to fuck  
12 with the flowin."

13 THE COURT: Yeah.

14 MR. HARDING: "Flowin" is drug distribution. And --

15 THE COURT: Okay. And who is Narni, by the way?  
16 N-A-R-N-I.

17 MR. HARDING: I can't remember, Your Honor.

18 THE COURT: Okay. But it's a, it's a real person?

19 MR. HARDING: Yeah.

20 THE COURT: Who's Pill?

21 MR. HARDING: Same thing, Your Honor. I can't  
22 remember.

23 THE COURT: Okay.

24 MR. HARDING: This is Mr. Harris singing again.

25 THE COURT: All right.

1           MR. HARDING: You see he mentions Sheistyville up here  
2 at, the fifth line in this track is Sheistyville. The block is a  
3 specific block on Woodland Avenue, which is where Mr., I think  
4 it's the 3500 block of Woodland Avenue, which is where Mr. Harris  
5 in particular was prone to stand out and try to sell crack on the  
6 street.

7           THE COURT: Okay.

8           MR. HARDING: So that's what he's talking about. And I  
9 have witnesses --

10          THE COURT: By the way -- I'm sorry. We should mark --  
11 do you have an extra copy of the draft transcript that you  
12 attached to your letter? If you don't, we can make a copy. We  
13 should mark it as Government's Hearing Exhibit One for May 15th.

14          MR. HARDING: I'm sorry, Your Honor.

15          THE COURT: That's all right. That's all right. I'll  
16 have --

17          MR. HARDING: I think I sent it electronically so you  
18 could print out a copy.

19          THE COURT: Okay. Thank you. Yeah. That's exactly  
20 what I'll do. I think I have your, I think I have your e-mail.  
21 I'll forward it. Do you have a printer down here, Belinda?  
22 Okay. Boy. This is great. Pretty amazing, isn't it?

23               All right. I'm going to forward your -- well, no. I  
24 don't think you did send it. Do you know when? You sent, I  
25 think you sent the letter responding to Mr. Crowe electronically.

1           Anyway, we'll make a copy before we conclude. All  
2 right. Okay.

3           MR. HARDING: Okay. Track 8 at the bottom of Page 6.

4           THE COURT: Yes.

5           MR. HARDING: He first of all addresses Bo.

6           THE COURT: Does he actually say "Bo" or does he say  
7 "B-O?"

8           MR. HARDING: I guess he says B-O here.

9           THE COURT: Okay. But you're confident there will be  
10 evidence that reference to B-O is the reference to Bo, which is a  
11 reference to Mr. Mitchell?

12          MR. HARDING: Yes, I am, Your Honor.

13          THE COURT: All right.

14          MR. HARDING: You'll see that he repeats it later on.

15          THE COURT: Okay. And T-M is Tony Montana?

16          MR. HARDING: Yeah. And then he goes on, at the top of  
17 Page 7, to talk about "B-O, hold ya head, nigga." That's because  
18 Bo is locked up at this point and what he's trying to do is boost  
19 the morale of his two colleagues that have been locked up for the  
20 Wyche brothers murder, Mr. Martin and Mr. Mitchell.

21               He then goes on, basically, to argue that the Down is  
22 winning. "Yo niggas still don't see clearly, though the rain is  
23 gone, that the Down up next, and the game is ours, all the pain  
24 that we felt, and the scars that marked, and the brains that we  
25 shot." By this time, they have killed four people by shooting

1       them in the head, Your Honor.

2               THE COURT:   And they are, again, the Wyches?

3               MR. HARDING:   Oliver McCaffity, Lisa Brown and the  
4       Wyche brothers, Darryl and Pete Wyche.

5               "Cause we refuse to starve, I'ma break it down iller  
6       for the slow ones, dog."

7               Goes on to --

8               THE COURT:   Is that supposed to be killer?   You think?

9               MR. HARDING:   Well, that may well be correct, Your  
10       Honor.   I wish --

11              THE COURT:   And iller doesn't --

12              MR. HARDING:   Yeah.   I need to ask my, my expert  
13       cooperator on that particular issue.   I've been through these  
14       songs line by line with somebody who's very familiar with these,  
15       with this jargon, and the specific references in these songs.   I  
16       can't remember what he told me about that, if anything.

17              THE COURT:   All right.

18              MR. HARDING:   "We was trying to build a label", that's  
19       a reference to, they were trying to get the money to make this  
20       record label work.   "But was broke ass thugs.   So we pulled off  
21       heists and we splattered blood, plus we grind on the strip, even  
22       sold some bud."   Bud is marijuana.

23              THE COURT:   And what's the strip?   Is that an  
24       identified location or --

25              MR. HARDING:   Well, I, I can't remember what my

1       cooperator will say specifically, Your Honor, but I believe he  
2       will say that it's Woodland Avenue in Park Heights.

3               THE COURT: All right. All right.

4               MR. HARDING: He's talking about how they committed  
5       their crimes to try to raise money to support Sheistyville on  
6       Shakedown Entertainment.

7               "What the fuck niggas really think Shake Down is?  
8       Buncha grimy ass niggas that was sheisty since kids. Tote big  
9       guns and don't even" --

10              THE COURT: What's it mean, "Snatch your moms up if we  
11       think she worth some brick?"

12              MR. HARDING: I think that's simply a boast about how  
13       far they are willing to go in order to make money.

14              THE COURT: Is a brick a block of cash?

15              MR. HARDING: I think it's --

16              THE COURT: Drugs?

17              MR. HARDING: Yeah, drugs. I think it's most commonly  
18       used to refer to a kilogram of cocaine.

19              THE COURT: Okay.

20              MR. HARDING: "She don't mean shit to you. She catch  
21       one in the head. Then these hungry" -- this is all boasting.  
22       But it also explains how the activity of this organization is all  
23       integrated in a way. It all goes to, to a common purpose and a  
24       common end. "Put the Ruger to you" --

25              THE COURT: I'm sorry. The third line from the bottom.

1 Will there be evidence that Mr. Harris or anybody else actually  
2 got "pistol whipped", quote-unquote? "I got scars from when I  
3 slipped and got pistol whipped."

4 MR. HARDING: Just one minute, Your Honor, if I may.

5 (Pause in proceedings.)

6 MR. HARDING: Well, we aren't sure, Your Honor. We do  
7 have a cooperator who talks about an attempt to kidnap Mr. Harris  
8 on one occasion. But my agent can't remember who that is at the  
9 moment.

10 THE COURT: All right. "They had the gun to my head."  
11 Might that be a reference to that?

12 MR. HARDING: Yes.

13 THE COURT: All right.

14 MR. HARDING: We know there was another occasion when  
15 Mr. Harris got into a fight on the street and, actually, it was a  
16 knife fight. And he cut the tip of his finger off in the course  
17 of this knife fight. And he actually sings about this on one of  
18 the songs.

19 The police were able to identify him because they  
20 fingerprinted the tip of his finger which he had accidentally cut  
21 off, and they came and arrested him.

22 THE COURT: Wait a minute. Say that again.

23 MR. HARDING: Mr. Harris got into a knife fight on the  
24 street, which we will have testimony about. He, in the course of  
25 the fight, accidentally cut off the tip of his own finger with



1 his knife.

2 THE COURT: He cut off the tip of his own finger using  
3 his own knife in the course of this fight?

4 MR. HARDING: Yes. It was on the ground, then, when  
5 the police arrived.

6 THE COURT: The tip of the finger was on the ground?

7 MR. HARDING: Yes.

8 THE COURT: So you actually meant it when you said they  
9 fingerprinted the tip of his cut-off finger?

10 MR. HARDING: Yes, I did.

11 THE COURT: And was the fight related to Shake Down or  
12 was it totally extraneous?

13 MR. HARDING: Broadly speaking, yes. It was a beef  
14 over a gun. Mr. Harris wanted a gun and the, and somebody else  
15 would not give him the gun.

16 THE COURT: And what's the general time frame for this  
17 incident?

18 MR. HARDING: This is all in the period immediately  
19 following the Wyche brothers murder, within a few weeks following  
20 the Wyche brothers murder. Mr. Harris gets locked up, you  
21 remember, in early August. So everything in these songs had to  
22 happen in the, in the late spring or early summer of 2003.

23 THE COURT: Okay. If I may, let me ask you a question  
24 about that. You said that the CD, all these songs come off one  
25 CD.

1 MR. HARDING: Yes.

2 THE COURT: That was marketed, sold, what have you. So  
3 am I to understand that these songs were both written, to the  
4 extent that there's any verisimilitude in the songs with regard  
5 to actual events, were they written and the CD, and recorded and  
6 the CD produced, as you said, between late spring and early  
7 summer or mid-spring and late summer? It all happened within a  
8 matter of just a couple of months?

9 MR. HARDING: Yes, Your Honor.

10 THE COURT: Okay. So none of these songs go back to --  
11 so again, we're talking 2003?

12 MR. HARDING: Yes.

13 THE COURT: So none of these songs go back to 2002 or  
14 2001, to your recollection?

15 MR. HARDING: No. They were producing other CD's. We  
16 turned over other CD's that were older than this one.

17 THE COURT: I see. So these are essentially CD's  
18 produced contemporaneously with the events of particular interest  
19 to the jury in this case?

20 MR. HARDING: Yes, Your Honor.

21 THE COURT: Okay. I get it. All right.

22 MR. HARDING: "Put the Ruger to your nozzle." We will  
23 have testimony that "nozzle" mean 's someone's head, again. This  
24 is in line with the favored technique for shooting people that  
25 these guys employed.

1 THE COURT: You on Page Eight?

2 MR. HARDING: No. I'm still at the bottom of Page  
3 Seven, Your Honor.

4 THE COURT: Page Seven?

5 MR. HARDING: On Page Eight, they turn to, they turn  
6 again to the beef with the Rice organization. And this is an  
7 important passage where Mr. Harris is singing and says, "But  
8 their fingers jammed. Nigga, you's a dead man. Being at war  
9 with the Down. Same shit with Hard Rock, B-O and Slow. SD don't  
10 play games." SD is Shake Down. "We buck brains fo' show.  
11 Nigga."

12 This is, this is their boastfulness about how they kill  
13 people and how they're going to prevail in their feud with the  
14 Rice organization. And again, we get it in the next passage.  
15 "Shoot niggas in their faces. That's the basics."

16 Then there's a reference to "Get their face lift from  
17 my tres eight bitch."

18 THE COURT: Is that a reference to a .38 caliber?

19 MR. HARDING: Yes, that is, Your Honor. And the .38  
20 caliber weapon was the gun used in the murder of McCaffity and  
21 Lisa Brown. They were both shot from the same .38 caliber  
22 weapon.

23 "Yo, my aim the greatest. Trigger finger has no  
24 patience. Shells never wasted. Death, I could taste it. It's  
25 coming cause I chased it. Sooner better than later. So I keep

1 the gun cocked, even with the safety broke."

2 And he goes on to talk about Mayor O'Malley's 25 year  
3 sentences for guns, but basically only to point out that none of  
4 this is going to keep him from doing what he needs to do to win  
5 this beef.

6 THE COURT: What's the reference to 25?

7 MR. HARDING: 25 year sentences. "O'Malley dishing 25  
8 for the gun that I tote."

9 THE COURT: Was that a proposal that the mayor was  
10 advocating at that time?

11 MR. HARDING: No. I think it's a mistakenly  
12 exaggerated view of how long the sentences were for weapons  
13 offenses in the city.

14 THE COURT: All right.

15 MR. HARDING: I think maybe federally you could get  
16 that much time if you were an armed career criminal, but 25 years  
17 from a city gun charge is unlikely.

18 Again, more about the beef later on.

19 THE COURT: The reference to vest is body armor?

20 MR. HARDING: Yes. "Want a beef, please believe your  
21 squad will die. It's nothing for the Down to catch a body. It's  
22 hobby, dog. Nigga say he seen the Ruge." That's a Ruger.

23 "Shit, he lying y'all. Any nigga seen the Ruge did a  
24 dying dog."

25 THE COURT: So if you see a Ruger, you're dead.

1 MR. HARDING: Yeah.

2 THE COURT: Afterwards.

3 MR. HARDING: Okay. Track 18. The theme here is how  
4 they've been --

5 THE COURT: Beating cases at arraignments?

6 MR. HARDING: Yes. They haven't been successfully  
7 prosecuted. The detectives investigating them and the people  
8 attempting to prosecute them haven't gotten very far.

9 THE COURT: I think, I think I might have to redact  
10 "some bitches with short dresses to fuck." I mean, that might be  
11 over the line, unless that has some particular meaning that you  
12 can identify. I mean, that would be particularly offensive to a  
13 large number of jurors.

14 MR. KURLAND: I'm sorry, Judge. What line?

15 THE COURT: It's about ten lines or so down on Page 9,  
16 Track 18.

17 MR. HARDING: Okay. Well, it's good to know.

18 THE COURT: Let's get that out of there.

19 MR. HARDING: Okay. "Detectives investigating. They  
20 ain't got shit on niggas. Beefs is escalating. Niggas putting  
21 hits on niggas. Some niggas get real scared."

22 They've got another war going on at this time, Your  
23 Honor. They've got the war going on against the law enforcement  
24 people who are investigating the crimes they commit. And so this  
25 song deals with that part of the struggle they're in at the

1 moment, also.

2 THE COURT: And "I make your mind fall out" is a  
3 reference to shooting somebody in the head, brains?

4 MR. HARDING: Yes. As well as "I snatch eyeballs out."  
5 I keep a gun, a knife, and something right for niggas. I snatch  
6 eyeballs out, take sight from niggas, I make your mind fall out.  
7 Right in front of your niggas."

8 THE COURT: Now, I'm sure you probably mentioned it  
9 before but perhaps not in the language you're using now. I  
10 recall the beef at, was it Hammerjacks?

11 MR. HARDING: Yes.

12 THE COURT: Is that the Rice, is that a part of the  
13 Rice dispute you're talking about? Because I don't remember ever  
14 you mentioning the quote-unquote "Rice organization."

15 MR. HARDING: The beef was with Howard and Raeshio Rice  
16 and other members of their organization, who were at the same  
17 party for Kenny Lyles, who's a big rap music producer.

18 THE COURT: Okay. And there was the fight and the  
19 stabbing and so forth. I remember that.

20 MR. HARDING: Yes. Mr. Mitchell actually pulled a  
21 knife. And our witnesses will say that he stabbed several people  
22 on the dance floor that night at Hammerjacks, including Raeshio  
23 Rice himself.

24 THE COURT: And the Rices we're talking about are the  
25 Rices who recently had a case in front of, was it Judge Quarles?

1           MR. HARDING: Yes, Your Honor. Everything in Baltimore  
2 is connected.

3           THE COURT: All right. So how much are you going to  
4 get into that?

5           MR. HARDING: Well --

6           THE COURT: I mean, again, I'm not going to hold you to  
7 your answer now. But obviously --

8           MR. HARDING: It's necessary to establish the motive  
9 for the first two murders in this case, Your Honor.

10          THE COURT: And remind me about that.

11          MR. HARDING: Okay.

12          THE COURT: I'm sorry if I'm losing it, Mr. Harding.  
13 But I'm doing my best to keep track here.

14          MR. HARDING: That's all right. I lose you, too.

15          THE COURT: As you well know, it's an elaborate tale.  
16 It's Canterbury Tales in Greek.

17          MR. HARDING: Yes. Mr. Mitchell went to this party for  
18 Kenny Lyles in the hopes of getting a promotion for his own, for  
19 Shake Down. He had other people with him whom we know about but  
20 who were not charged in this case, but who were co-conspirators,  
21 actually.

22                 The fight broke out between Mr. Mitchell and one of the  
23 other members of the Rice organization. We're not entirely sure  
24 how it broke out. But it was just the inevitable sort of  
25 conflict that arises between rival groups, often arises between

1 rival groups at a night club event like this.

2 The Rice organization also wanted to promote their  
3 music with Kenny Lyles. It may have been --

4 THE COURT: Did they produce music?

5 MR. HARDING: Yes, they did.

6 THE COURT: Okay.

7 MR. HARDING: So there was, somehow pushing and shoving  
8 started. And then Mr. Mitchell pulled a knife and started  
9 stabbing several people. He was himself then beaten up outside  
10 of Hammerjacks as he was leaving, and so was his cousin who was  
11 with him. Both of them were badly beaten up on the parking lot  
12 outside Hammerjacks underneath I-83 down there, off Guilford  
13 Avenue.

14 Mr. Mitchell was hospitalized, as was his cousin. Mr.  
15 Mitchell was arrested because next to him was recovered the  
16 bloody knife that he used in the, in the stabbings.

17 A DNA comparison has established that some of the blood  
18 on that knife was Mr. Mitchell's own blood. And so -- or no. I  
19 take that back. Other DNA recovered from a handle of the knife  
20 that was not blood, it was skin fragments or something like that,  
21 on the knife, has been identified as Mr. Mitchell's DNA. So we  
22 can tie that knife to Mr. Mitchell quite clearly.

23 He was arrested and processed. He was never  
24 successfully charged. The Rices didn't pursue it. They instead  
25 filed a civil suit against Hammerjacks, but they didn't pursue a



1 criminal case against Mr. Mitchell. And Mr. Mitchell knew why.  
2 He knew that they would attempt to resolve it the way drug  
3 organizations in Baltimore normally resolve beefs, which doesn't  
4 include law enforcement.

5 Mr. Mitchell decided that Oliver McCaffity was the hit  
6 man that had been hired by the Rice organization to kill him. He  
7 and Harris arranged to, by telephone, for a meeting with Oliver  
8 McCaffity. Mr. McCaffity showed up with Lisa Brown in the car  
9 with him. We believe there was to be some kind of transaction on  
10 that event. Somebody was to buy a gun from somebody else. That  
11 was the reason for the meeting.

12 We have cell phone connections that tie Mr. Mitchell to  
13 the phone that was recovered from the body of Mr. McCaffity in  
14 the car that night. We know that he was in telephone contact  
15 with Bo because the directory on the phone, Mr. McCafferty's  
16 phone, listed the number that he was in contact with as the  
17 number for Bo.

18 THE COURT: Why would McCaffity go to a meeting?

19 MR. HARDING: Mr. Mitchell thought it was to kill him  
20 and he was determined to make a preemptory or peremptory  
21 strike -- a preemptive strike.

22 THE COURT: Okay. So the government's theory is that  
23 Mitchell thought McCaffity had been assigned to kill him, Mr.  
24 Mitchell. And Mr. Mitchell -- who initiated the contact?  
25 McCaffity?

1 MR. HARDING: I'm not sure I can answer that  
2 question --

3 THE COURT: Okay.

4 MR. HARDING: -- definitively, Your Honor.

5 THE COURT: But they knew each other?

6 MR. HARDING: Oh, they did. They knew each other very  
7 well. They had committed crimes together.

8 THE COURT: Okay. All right. So the McCafferty/Brown  
9 murders were an ambush?

10 MR. HARDING: Yes.

11 THE COURT: Motivated by concern that McCaffity was  
12 going to essentially ambush Mr. Mitchell?

13 MR. HARDING: Yes. And you may recall that in the  
14 statement that Mr. Mitchell gave about the Wyche brothers murder,  
15 he talked about how he was in cell phone communication with the  
16 Wyche brothers and directed them to this location where they  
17 would meet a guy named L. It's a perfect description, also, of  
18 the way this previous murder was set up.

19 We believe the person that Mr. Mitchell directed them  
20 to meet up was, in fact, Mr. Harris. And Mr. Harris was the one  
21 that climbed into the back seat of the car and executed both  
22 McCafferty and Brown with shots to the head.

23 Brown was killed simply because she was there. I don't  
24 think anybody knew she was going to be in the car and she was  
25 simply McCafferty's girlfriend.

1 THE COURT: Okay.

2 MR. HARDING: But there's a very close connection  
3 between the Hammerjacks incident and that double murder.

4 THE COURT: I remembered that clearly. I just didn't  
5 remember the mention specifically of Rice or the Rice  
6 organization.

7 MR. HARDING: Okay. We're ready for Track 20, then.

8 THE COURT: Yes.

9 MR. HARDING: This is the final song where Harris is  
10 talking to the public and generally fans of Shake Down  
11 Entertainment. He's dedicating it to his man, B-O. "You know  
12 what I'm saying? Lil Weaze." That's Mr. Martin. "You know what  
13 I'm saying?" Cease is a guy named Caesar who actually we know  
14 relatively little about because he was locked up at this time.  
15 But he was involved in founding Shake Down with Mr. Mitchell.  
16 His name appears on the paperwork that established this outfit,  
17 along with Mr. Mitchell.

18 Then he says "Real niggas on lock." Mr. Mitchell and  
19 Mr. Martin were on lockdown at this point following their arrest  
20 in the Wyche brothers murder. "My peoples killers. You know  
21 what I'm saying? This shit for y'all niggas. You know what I'm  
22 saying? All my niggas on lock. This was for the whole B-More.  
23 You know what I'm saying? We represent the Heights, but this was  
24 for the whole Baltimore, dug. This was for the whole B-More."

25 THE COURT: What's hunger pains? And what's the

1 relevance of June?

2 MR. HARDING: June is when their next, that's when he  
3 promises their next album is going to come out, Your Honor.  
4 That's how we know this was, this CD appeared sometime before  
5 June. It appeared either in late April or June.

6 THE COURT: I see. We got my album coming -- okay.

7 MR. HARDING: "Hunger pains" is, I think, just the name  
8 of the CD that's going to appear in June. This CD also had a  
9 name, obscene name.

10 THE COURT: What's the name of the CD?

11 MR. HARDING: Pure Shit.

12 THE COURT: Okay. All right. Thank you, Mr. Harding.  
13 Mr. Martin, I'm glad to start with you.

14 MR. MARTIN: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. MARTIN: Well, Your Honor, I suppose I got mostly  
17 what I wanted out of this by what you just did, because up till  
18 now the relevance issue, we just didn't understand. We still  
19 don't know enough about the facts. I mean, we've got, as you  
20 know, there's this ongoing debate about what we got through Mr.  
21 Coburn and what we don't have. There's a lot of stuff we still  
22 don't have.

23 So it was interesting for me to hear Mr. Harding's  
24 exposition of why these things are admissible.

25 I was not at the hearing when you ruled, where you

1 ruled that Number 11 was in. I think that's back when I was sick  
2 last year. But I understand that ruling.

3 You know, Your Honor, that ruling I understand far more  
4 than I could understand why these are admissible. These are more  
5 general, you know. You may not like the art, but that's kind of  
6 what it is. And in fact, that is what it is.

7 I just don't, I think we have to be careful here about  
8 how closely one can tie what's being said here to what the actual  
9 crimes are that are being charged. You know, that they should  
10 talk about drug dealing? What rapper doesn't talk about drug  
11 dealing?

12 You know, if you can tie it specifically, Number 11 is  
13 a good example, at least if Mr. Harding's evidence comes in the  
14 way he thinks it will come in, is an example of how he may be  
15 able to tie it specifically to a specific crime charged here.  
16 But the rest of this stuff is so general. I have a real problem  
17 with it, especially when you try to balance the prejudice of it.

18 The only reason this is coming in is because it shows  
19 these guys to be bad guys, paints them to be terrible people who  
20 talk about murders and talk about drug dealing and the police and  
21 all this other stuff. I just don't, without it being more  
22 specifically tied to the crimes charged here, I have a difficult  
23 time thinking it would be fair to permit the rest of these tapes  
24 to be played.

25 You know, having just digested for first time what the

1 theory is, you know, I understand, but I still think that these  
2 latter tapes, I mean, half the time when you ask Mr. Harding a  
3 question he would say, I think this is what it means, we think  
4 this is what it means. If they have witnesses who are going to  
5 say that's what it means, that's one thing. But to try to  
6 speculate to what it means and speculate that they were fighting  
7 with the Rice bothers or speculate that they were fighting with  
8 some, you know, the third theory, the third war they have going  
9 on with the police, that's just all guessing. Nobody really  
10 knows.

11 And it's prejudicial, very prejudicial in the manner in  
12 which, if you listen to the tapes, the manner in which things are  
13 said and the actual wording, Your Honor. I just think it's too  
14 general to permit these other tapes to come in. I'm not asking  
15 you to revisit the first one.

16 There's a certain amount of artistic license that has  
17 to be granted here. You know, we may not like it, but it's a  
18 talent that apparently my client had and was seeking to use it.  
19 But we're all guessing about it.

20 For instance, we still don't know where this thing was  
21 ever played. I don't think there is going to be any evidence as  
22 to where it was played. Mr. Harding says he has evidence that  
23 they tried to sell it. I don't know. He says he has evidence  
24 about it being played on a radio station. We heard that the last  
25 time. I think we heard that in the papers.

1           You know, if it was played on a radio station, I assume  
2 they'll have some witnesses who will talk about it having been  
3 played on a radio station. But then we get into this whole area  
4 of the purpose. The purpose is to intimidate others. Is the  
5 purpose just to write songs that fit within the genre of what  
6 everybody their age and their circumstances is writing about or  
7 is the purpose really to intimidate others?

8           How wide of an acceptance are these songs going to get  
9 that they'll actually have any, any effect in intimidating  
10 anybody else? You know, that they may, it's one thing to say  
11 they bragged about things they did on Tape 11, you know, Number  
12 11, Track 11, but it's another thing to say that they were out  
13 there disseminating this to the world so that everybody would be  
14 afraid of them. That just doesn't make a whole lot of sense to  
15 me. That doesn't strike me as, when you try to balance the  
16 fairness, that doesn't strike me as something the Court ought to  
17 be engaging in because there's a lot of unknown here.

18           Nobody really knows, except perhaps the artist, what he  
19 meant. Nobody really knows except the artist when these things  
20 were really written. Mr. Harding says they try to locate it  
21 between April and June. That's convenient that they would locate  
22 it between April and June. But I don't really know that. You  
23 would think there would be some document or something somewhere  
24 that would indicate when this CD was cut. Maybe even an analysis  
25 of the CD would show that. I don't know the answer to that.

1           Your Honor, I'm a little bit hamstrung because I didn't  
2 hear until today exactly why it was that Mr. Harding thought  
3 these were admissible. As I think you recall from the papers we  
4 filed, that's really what we were asking for when we filed the  
5 motion.

6           So having said that, Your Honor, unless you have any  
7 questions, I don't have anything further to say.

8           THE COURT: Thank you very much, Mr. Martin.

9           MR. MARTIN: Thank you, Your Honor.

10          THE COURT: By the way, we did take care of your jury  
11 issue.

12          MR. MARTIN: You did?

13          THE COURT: I know you regret it. I know you regret  
14 it. I'll be happy to hear from any other counsel on this issue.  
15 Mr. Coburn, good morning.

16          MR. COBURN: Good morning, Your Honor. Thank you so  
17 much. I guess I'm going to have two principal concerns about  
18 this, and I can be very brief about it, Your Honor.

19          The first one has to do with the methodology, with  
20 which I take it from Mr. Harding's remarks, he intends to try to  
21 "explain", quote-unquote, to the jury, what these lyrics mean.  
22 I'm not 100% sure whether he believes that either one of the  
23 cooperators that he's going to call or a case agent is going to  
24 be qualified as an expert or is going to be able to present lay  
25 opinion testimony about the meaning of the lyrics within what's



1 permitted under the Federal Rules of Evidence. But either way, I  
2 just wanted to, I don't know if it's anything Your Honor needs to  
3 resolve right now or even could resolve right now. But I wanted  
4 to just alert the Court to the fact that we will have an  
5 objection to that. I'm sure we'll be doing something in writing  
6 on it.

7           The other thing was specifically with respect to Mr.  
8 Gardner, as we were all listening very closely to what Mr.  
9 Harding was saying about his interpretation of the meaning of  
10 these lyrics. There's one particular lyric where I believe Mr.  
11 Harris is attributed with the phrase "It's just me, Weaze and  
12 Bo." And that, of course, is of interest to us because Mr.  
13 Gardner is not any of those people. In fact, it doesn't sound  
14 like Mr. Gardner's actually referenced anywhere in any of these  
15 lyrics.

16           And so we think that we have a special issue with  
17 respect to the admissibility of this evidence, particularly  
18 because it is so incredibly inflammatory. I mean, it would be  
19 hard, I think, to overstate the kind of impact that these lyrics  
20 are going to have on the jury once they're heard and read and, if  
21 allowed, interpreted.

22           I mean, even Mr. Harding, as he stood at the podium, it  
23 was hard for him to say some of the words. I mean, they're just  
24 going to be very upsetting, extremely upsetting to a jury,  
25 particularly to the extent they're linked directly to particular

1 homicides.

2 So to the extent they don't actually directly implicate  
3 Mr. Gardner, I think it raises an issue from our point of view in  
4 terms of their admissibility against him.

5 THE COURT: Thank you, Mr. Coburn.

6 MR. COBURN: Thank you, Your Honor. I should just add  
7 by the way, very briefly, Your Honor, there is still that issue  
8 that Your Honor referenced at the last hearing in terms of some  
9 additional documents. This doesn't relate directly to the  
10 lyrics -- Mr. Martin just referred to it when he was up here --  
11 of some additional materials that appear to be missing from what  
12 we, had initially been disclosed to us that we then disclosed to  
13 the other counsel.

14 THE COURT: You referring to Mr. Crowe's letter?

15 MR. COBURN: Yes. I just wanted to alert Your Honor.

16 THE COURT: Yes. I'm going to take that up before we  
17 break.

18 MR. COBURN: Oh, would Your Honor allow Mr. Kurland to  
19 state just a brief supplemental word?

20 THE COURT: Certainly. Good morning, Mr. Kurland.

21 MR. KURLAND: Good morning, Your Honor. Your Honor,  
22 just to amplify just for a moment on Mr. Coburn's first point  
23 with respect to the, both on issues with respect to lay opinion  
24 testimony and supposed expert testimony.

25 I could say we're certainly going to have serial

1 objections to any sort of interpretation offered by, you know,  
2 almost on a lyric by lyric basis, on a witness by witness basis  
3 with respect to that.

4 Just to kind of put it into the larger perspective.  
5 The references, I mean, certain of this stuff, according to the  
6 government's theory, is supposed to be accepted as fact as  
7 reflective of boasting about actual murders to take place. But  
8 then, when it's convenient to the government, when there's a,  
9 quote, "inaccuracy", whether it's former Mayor O'Malley's  
10 sentencing and stuff like that. I mean, there's a very, very  
11 selective picking and choosing as to, you know, what is accurate,  
12 what is not, so on, so forth.

13 That kind of feeds into the general point that Mr.  
14 Martin made, I mean, these are song lyrics. We will certainly, I  
15 just wanted to make it clear, just based on the way the  
16 government had presented it, that there are going to be serial  
17 objections almost with respect to every witness who comes in to  
18 try to interpret, both under 703 and 704.

19 THE COURT: All right. Thank you, Mr. Kurland. Ms.  
20 Rhodes, good morning.

21 MS. RHODES: Good morning, Your Honor. This is, this  
22 has been --

23 (Defendant Harris has a seizure.)

24 DEFENDANT MITCHELL: He's having a seizure. He's a  
25 diabetic.

1 THE COURT: Call 911 immediately, please.

2 DEFENDANT MITCHELL: Put him on the floor on the side.  
3 Put him on the floor on his side.

4 A VOICE: He's an epileptic.

5 THE COURT: Marshals, you may remove the defendants  
6 from the courtroom.

7 Will you call for medical attention immediately?

8 A MARSHAL: Yes, sir.

9 MR. MARTIN: Your Honor, you might want to have the  
10 marshals check to make sure he's getting his medicine.

11 THE COURT: I will do that.

12 MR. MARTIN: Thank you.

13 THE COURT: I understand he's a diabetic.

14 MR. MARTIN: Epileptic.

15 THE COURT: Epileptic.

16 (Defendants Mitchell, Martin and Gardner leave the  
17 courtroom.)

18 THE COURT: Let the record reflect that Mr. Harris  
19 appears to be having a seizure. Clearly, the marshals are doing  
20 what they can to comfort him, and we have called for medical  
21 attention. And the remaining defendants have been removed from  
22 the courtroom.

23 We will stand in recess. I'll be back in touch with  
24 counsel shortly. He is conscious.

25 (Recess at 11:28 a.m.)

1 (Resume proceedings at 11:53 a.m.)

2 THE COURT: I thank the marshals for their professional  
3 and sensitive response to the unfortunate occasion of Mr.  
4 Harris's seizure. He's on his way to the hospital, accompanied  
5 by the marshals. And I'm confident that he'll receive adequate  
6 care. And I will doublecheck to insure that all appropriate  
7 medications are being made available to Mr. Harris.

8 I think we can conclude this matter fairly  
9 expeditiously. Mr. Harris's absence, I think, is not a problem.  
10 I've heard from Mr. Martin on his behalf. And so I'll proceed.

11 If Ms. Rhodes or Mr. Lawlor, Mr. Pyne, or Mr. Crowe,  
12 want to be heard on the issue, I'll be glad to do that. And then  
13 we'll proceed to consider scheduling issues and the issues raised  
14 in Mr. Crowe's letter.

15 MS. RHODES: Thank you. In light of the government's  
16 position that it's going to use cooperators as experts regarding  
17 the rap lyrics, what we would request is an in limine hearing at  
18 least a few weeks before trial begins to, in addition to, first  
19 of all, getting expert notice and all that that entails from the  
20 government regarding these people, we think that because, and as  
21 Mr. Kurland mentioned, I think it was, that we need kind of a  
22 line-by-line review of these lyrics as to what's admissible and  
23 what's not because of the extraordinarily prejudicial nature of  
24 them. I think we need a hearing where the actual witnesses  
25 testify and give us some of the foundation, some of their, what

1 their expertise is, and we can go through some of that.

2 Otherwise, it's going to be a day long hearing, at least, in the  
3 middle of the trial. Because I do think we have to go through a  
4 lot of the lyrics, some other things in addition to what the  
5 Court mentioned.

6 There's the reference to moms or the brick, and other  
7 things, we'll come get your bitches, too, that sort of thing,  
8 that really aren't relevant at all, that we've heard from the  
9 government, even, in furthering the conspiracy.

10 So that would be, that would be our request -- what  
11 information the experts relying on, what their history is, and,  
12 of course, the other foundational issues having to do with the  
13 regular rules of evidence.

14 I have one other matter, Your Honor, although I don't  
15 know if you wanted to hear from Mr. Crowe first and then --

16 THE COURT: I would rather do that.

17 MS. RHODES: Thank you.

18 MR. CROWE: I believe I can be very brief, Your Honor.  
19 Other counsel have covered many of the points I was going to make  
20 and some of them that I would have made had I thought of.

21 It's clear that if the government's proffer of  
22 authenticity holds, and so far that's all that we have, that  
23 these rap lyrics present something of a difficulty for Mr.  
24 Harris. Quite obviously, the statements themselves would be  
25 inadmissible hearsay with respect to Mr. Martin unless the

1 government can show as a preliminary matter before the Court that  
2 these were, in fact, statements made in furtherance of the  
3 conspiracy.

4 I would point out that the time line in which the  
5 government seems to rely is not quite as tight as Mr. Harding  
6 would have it. He had indicated that the McCaffity/Brown murders  
7 and the Wyche brothers murders occurred in 2003. In fact, the  
8 indictment charges, and those murders occurred in 2002.  
9 McCaffity/Brown murders were in February of 2002 and the Wyche  
10 brothers were murdered either very late March 24, or more likely  
11 very early March 25, 2002.

12 Mr. Harding's letter indicates that there is, from some  
13 internal, his April 28th letter indicate --

14 THE COURT: I'm sorry, Mr. Crowe. Let's see if we can  
15 clarify that. Did we just have the year wrong for everything?

16 MR. HARDING: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. HARDING: It should have been 2002.

19 THE COURT: 2002.

20 MR. HARDING: That was my first point to make in my  
21 response to defense counsel.

22 THE COURT: Okay. So we have the time frame right, we  
23 just had the year wrong.

24 MR. HARDING: Yes, Your Honor.

25 THE COURT: Okay. Go ahead.

1           MR. CROWE: But nonetheless, the time problem still  
2 remains because, as I understand from Mr. Martin, his client was  
3 first arrested in, was first arrested in either August or  
4 September of 2003. And I do not know how it is that the  
5 government can say that, that this CD first appeared in April or  
6 May of 2002 or April or May of 2003, as it's stated in the  
7 letter.

8           We think this is important because the farther removed  
9 it is from point of time from the actual murders themselves, the  
10 more less likely it is either to be accurate or, for that matter,  
11 to be in furtherance of the conspiracy.

12           The other point I would make is that although the  
13 statement is made that these were in furtherance of the  
14 conspiracy because it was a lot of braggadocio, it was  
15 threatening people, it had to do with threats to people with whom  
16 they were currently in a beef, that is the Rice brothers, I don't  
17 know if the Rice brothers were free at the time these things came  
18 out. I don't know if there really was much of, much of a beef  
19 going on.

20           My expectation is that this was probably something  
21 which, at best for the government, discussed things that would  
22 happen, possibly touched on the conspiracy, but would really, it  
23 would seem to me that it's pure speculation to say that it  
24 furthered any of the aims of the conspiracy.

25           Indeed, one of the things that we've been told these



1 people were conspiring to do was to basically avoid detection.  
2 And I find it, I can't think of anything that's more  
3 counterproductive to a conspiracy to avoid detection than to have  
4 somebody like Mr. Harris, you know, publishing, publishing these  
5 lyrics and passing them out.

6 And if, in fact, he was doing it, it was clearly not in  
7 furtherance of the conspiracy. Certainly didn't do anything to  
8 help Mr. Mitchell, who's been locked up I think since April 1 of  
9 2002, or my client, who was locked up on, I think it was April 17  
10 of 2002.

11 So we do have those, we do have those objections. I  
12 mean, really, all that we've heard from the government so far has  
13 been proffers. And I don't think that the Court can really rule  
14 on admissibility just on the basis of proffers. Thank you.

15 THE COURT: Thank you, Mr. Crowe. Brief word, Mr.  
16 Harding?

17 MR. HARDING: Yes. Thank you, Your Honor. Yes. The  
18 year was wrong. It's 2002. And I apologize for that.

19 Mr. Martin seemed to suggest that I had been deficient  
20 in my obligations for not having previously divulged the  
21 government's interpretation of these songs. But I know of no  
22 obligation under Rule 16 or any other doctrine that would require  
23 the government to provide defense counsel with its understanding  
24 of the meaning of songs or any documents in evidence in a case.

25 Mr. Martin says I used the word "I think" he said half

1 the time. I don't believe it was anywhere near half the time.  
2 In any event, the government's quite confident that it will have  
3 testimony in support of the various interpretations that I  
4 relayed to the Court this morning from witnesses who really have  
5 no doubt about the meaning. In fact, for the most part, the  
6 meaning is self-evident. Once you're told what, what's being  
7 referred to, I think it all sort of clicks. And I don't think  
8 that the interpretations are at all in doubt really.

9 I do agree that my saying that I thought the reference  
10 to O'Malley dishing out 25 years was an exaggerated view of how  
11 long people get for gun crimes in the city. I don't anticipate  
12 eliciting any testimony about that. And I was speculating at  
13 that point. But I was attempting to respond to the Court's  
14 questions with a theory of the government's. But that's not  
15 something we would elicit from a witness on the stand.

16 Mr. Martin also felt that some of these songs, the  
17 later ones, are not as specifically tied to the charged crimes as  
18 Track 11 is. And that, of course, is not the standard the Court  
19 has to use in evaluating the admission of coconspirators's  
20 statements. The standard is simply whether what was said was in  
21 furtherance of the conspiracy.

22 And the government has presented to the Court already  
23 why the statements made about murders and other crimes are in  
24 furtherance of the conspiracy, because they were intended to  
25 intimidate and to threaten snitches and to threaten members of

1 the Rice organization. These are all things that unquestionably  
2 are in furtherance of the conspiracy.

3 As I pointed out in my pleading, which is Paper 22-1,  
4 two-two-one, Mr. Gardner conceded in his motion in limine filed  
5 over two years ago that, quote, "communications to third parties  
6 may be in furtherance of a conspiracy if the communications are  
7 intended to threaten or intimidate a victim or witness or to act  
8 in a way that will assist in accomplishing the conspiracy's  
9 objectives." That's from Mr. Gardner's pleading. And it cites  
10 Shore as one of the Fourth Circuit cases that goes to in  
11 furtherance and its meaning in this circuit.

12 One other point. Ms. Rhodes raised an issue about  
13 expert notice for cooperators. I anticipate using cooperators as  
14 lay experts under Rule 401, not as rule -- I'm sorry -- 701, not  
15 under 702. This is commonly done in trials. We often have  
16 cooperators give their understanding of the meanings of phrases  
17 used in wiretaps or consensually monitored conversations.

18 And the requirements of 701 are simply that testimony,  
19 the testimony can include opinions or inferences which are, A,  
20 rationally based on the perception of the witness, B, helpful to  
21 a clear understanding of the witness' testimony or the  
22 determination of a fact in issue; and C, not based on scientific,  
23 technical, or other specialized knowledge within the scope of  
24 Rule 702.

25 I would envision using a case agent, also, to translate

1 some coded words or to explain historical background, who Mr.  
2 Caesar was, for example, but again, not in any way that is at all  
3 unusual.

4 These are very normal and common ways that police  
5 officers or agents are permitted to testify about language used  
6 in tapes.

7 The Rices were out of jail at the time these songs were  
8 sung. These songs were sung, even though I gave the wrong year,  
9 it was 2002. They were, they were clearly, I think I've already  
10 explained why these songs all had to have been produced and the  
11 CD produced in between the latter part of April and early,  
12 perhaps the very, well, sometime in May. Because at the end,  
13 Shelton Harris gets up and says, this next CD is coming out in  
14 June. Mr. Harris was indeed locked up in August of 2002. He was  
15 locked up for that drug case, you remember, when the police  
16 recovered all those drugs out of the house where his, where he  
17 was living with his mother and his sister and one or two other  
18 people.

19 So if the Court wants another, wants me to provide a  
20 written explanation of the timing, why it is the government is  
21 confident about the timing of this production of this CD, I'd be  
22 happy to do so. But I feel that I've done that to some extent on  
23 the record here today in open court.

24 Mr. Crowe's argument that this material isn't in  
25 furtherance of the conspiracy because it, in fact, provides

1 evidence against the conspiracy, that it hurt the conspiracy,  
2 that could be said of any coconspirator's statement at all. If  
3 that were a criteria for finding that some statement were not in  
4 furtherance of the conspiracy, then no coconspirator's statement  
5 would ever come in because it's always offered as evidence of the  
6 conspiracy. It's always offered as something to help prosecute a  
7 conspiracy.

8 I have to completely reject the notion that because  
9 this material winds up being useful in a prosecution of a  
10 conspiracy, that it is therefore not in furtherance of the  
11 conspiracy.

12 Thank you. That's all I have, Your Honor.

13 THE COURT: Thank you, Mr. Harding. The Court's ruling  
14 is, I think, of necessity to a certain extent preliminary only.  
15 But I am satisfied prima facie that the government has satisfied  
16 all of the requirements for admissibility of the excerpts that  
17 we've gone over this morning. And therefore I expect to admit  
18 the rap music and related lyrics, together with the transcripts  
19 as an aid to listening to the actual productions, and/or any  
20 handwritten or other produced copies of such lyrics that the  
21 government may produce.

22 As to Mr. Harris, of course, these are admissions and  
23 so the Court, except for Rule 403, need not concern itself too  
24 much with coconspirator's statements. It's really as to the  
25 remaining three defendants that the question of coconspirator

1 exception arises.

2           The Court finds the lyrics absolutely compelling. And  
3 the Court is mindful that Mr. Harding is proceeding by way of  
4 proffer. Some seemingly he had greater confidence than others.  
5 But I accept the government's proffers at face value. I don't  
6 think Mr. Harding has made up any of his interpretations. It  
7 seems to me that he's done the best he could here today to  
8 recollect, with the agent's assistance, what is no doubt probably  
9 a mound of witness interviews and exchanges, proffers, and that  
10 kind of thing. And thus, that accounts for the Court's  
11 preliminary, the preliminary nature of the Court's ruling.

12           But accepting the proffer at face value, accepting that  
13 the government will have witnesses that will substantially  
14 identify, authenticate, and support the government's  
15 interpretations of the lyrics, the Court has no hesitation in  
16 finding that the coconspirator exception applies as to the other  
17 three defendants for the reasons the government has indicated.

18           The interpretation of the lyrics is, in part, as Mr.  
19 Harding suggested, simply a matter of common sense and plain  
20 language. Other interpretations of the lyrics require an  
21 inferential and interpretive analysis. And to the extent that  
22 the government intends to use lay opinion testimony, it seems to  
23 me the government's going to be permitted to do that. Whether  
24 the government would be permitted or even attempt through classic  
25 expert 702 opinion testimony, I don't need to consider that now.

1 The government hasn't filed the appropriate notice, to my  
2 knowledge. And I take it the government is still thinking about  
3 that. And I'll cross that bridge if and when we get to it.

4 But for purposes of lay opinion, it strikes me as  
5 exactly the kind of evidence that lay opinion testimony would be  
6 clearly admissible.

7 Certainly with respect to any coconspirator or other  
8 person identifying himself or herself as an aficionado of rap  
9 music generally, as involved in the, shall I say, underworld  
10 production, consumption of rap music in the specific Baltimore  
11 area, I'm not prepared to rule out in any way the possibility  
12 that there will be witnesses who are very familiar with this  
13 material, who, according to the government, are very familiar  
14 with this beef between the so-called Mitchell organization and  
15 the Rice organization, the seminal event at Hammerjacks that is  
16 the focus of the government's theory.

17 So while I'm reserving final ruling on the  
18 admissibility of any particular tape, it seems to me that the  
19 objections that I've heard today don't outweigh the government's  
20 contentions.

21 On 403, I've already identified one line that  
22 absolutely jumped out at me as just over the top and doesn't add  
23 anything. And perhaps it pales in significance. I can  
24 appreciate the defense perspective given the highly prejudicial  
25 material, nature of the material in general. But what the Court

1 is concerned with here is undue prejudice, not prejudice arising  
2 from the probative value of highly probative evidence that is  
3 admissible. And that's what I conclude.

4 I agree with Mr. Crowe. Generally, one wouldn't expect  
5 a member of a conspiracy to put up a billboard on Interstate 83  
6 announcing the conspiracy's goals, purposes, and history. But  
7 there's no requirement that a member of a conspiracy be smart,  
8 strategic, humble. And that's the situation here.

9 It's remarkable that a person would do such a thing,  
10 but stranger things have happened.

11 On the question of, of interpretation, the defense will  
12 be able to challenge through cross examination any witnesses, of  
13 course. And I don't rule out the possibility, although this is  
14 not a promise, I don't rule out the possibility, along the lines  
15 that Ms. Rhodes alluded to, of permitting counsel to voir dire  
16 certain witnesses before they're allowed to testify in front of  
17 the jury. We'll just have to see how that goes.

18 I've done this before in cases. It can be disruptive  
19 to the progress of the trial, but I think we can manage it. I  
20 gather that the government's going to have enough witnesses in  
21 this case that we'll never run out of witnesses and we'll never  
22 run out of things to do.

23 But if it should come to pass that we need to set aside  
24 an hour here or an hour there in respect to witness testimony  
25 concerning these rap lyrics, I'll be prepared to excuse the jury



1 for an extended lunch or a later arrival for the purpose of  
2 giving counsel for the defendants an opportunity to voir dire a  
3 witness with respect to any lay opinion testimony and with  
4 respect to authenticity, and with respect to personal knowledge  
5 regarding this rap, rap music business. But I don't intend to  
6 have a pretrial hearing on a motion in limine or some such  
7 procedure as that.

8 We'll talk, obviously, in far greater detail down the  
9 line about the government's order of proof. I certainly would  
10 expect, without being too disruptive of the government's plan, to  
11 have this evidence come in much later rather than earlier. To  
12 the extent that there's any question here about whether the  
13 government can satisfy its preliminary burden to establish prima  
14 facie the existence of one or more of the conspiracies which are  
15 alleged in the indictment, I would expect, as I say, that we get  
16 into the whole issue of rap lyrics, as I say, later in the trial.

17 It's not going to be a part of the first week of the  
18 trial. It's not going to be a part of the second week of the  
19 trial. And I suspect it's not going to be a part of the third  
20 week of the trial. I will have heard a lot of evidence, a lot of  
21 testimony, seen a lot of exhibits, before we have anybody in here  
22 talking about rap lyrics.

23 That's not to say the government can't mention this  
24 evidence in its opening statement in an appropriate way. But  
25 obviously, under the circumstances, the government would be wise

1 to be cautious in not going into it too deeply since the Court's  
2 ruling is preliminary.

3 So I've heard the objections. I've considered the  
4 arguments. I've considered the language. Again, I'll reiterate  
5 very briefly, much of the lyrics speak for themselves and I'm  
6 prepared to indulge the inference that the government will be  
7 able to tie up in a significant way through witness testimony and  
8 through inference itself some of the events, activities, themes,  
9 as Mr. Harding put it, described in the rap lyrics with other  
10 evidence in this case.

11 If it's not seamless, certainly, as I say, there's a  
12 compelling and striking overlap between the allegations in the  
13 indictment and the government's rational theory of the case, that  
14 this case is about people who were involved with guns, drugs,  
15 killing, and rap music. And I find that that's not an  
16 inappropriate or unduly prejudicial approach to the case.

17 I'm happy to receive any additional briefing that any  
18 of counsel wish to submit and I'll consider it. But I hope my  
19 ruling is clear, that I do expect to admit the lyrics with  
20 whatever appropriate limiting instruction that any of counsel  
21 might, might request.

22 Okay. Mr. Crowe, I'd be happy to take up some of your  
23 issues, which I think are shared with, shared by other counsel.  
24 And then I'll hear from counsel each on any additional matters.

25 As you approach the lectern, let me say, we have

1 remaining -- I'll hear you later, Mr. Kurland, please -- we have  
2 June 12th and June 13th. I fully expect to have full day  
3 hearings on both of those days. Having said that, I may have a  
4 problem on June 13th, but I'm working to avoid that.

5 So please, don't schedule anything on June 12th or June  
6 13th. I think we're going to be here for full days on those days  
7 to do wrap up.

8 Our final pretrial conference is scheduled for August  
9 22nd, Friday. And depending on how much we get done on June 13th  
10 and 14th, that may also be a full day. It may be a combination  
11 pretrial conference and final motions hearing. So we'll try to  
12 get through as much as we can on the 13th and 14th. But please  
13 keep clear Friday, August 22nd, as well.

14 Mr. Crowe.

15 MR. CROWE: Thank you, Your Honor. I wrote initially  
16 to Mr. Harding and then much more recently to the Court about two  
17 matters. The first has to do with some discovery. And this is a  
18 matter, actually, that was discussed, I think, at the April,  
19 April 3rd hearing.

20 Our understanding is that when Mr. Gardner was  
21 scheduled for a separate trial, the government provided quite a  
22 bit of discovery to him. Most of it was probably what we'd call  
23 Jencks and Giglio material. Thereafter, that trial was  
24 postponed. And indeed, the cases were all joined back together.

25 And the Court directed Mr. Coburn and Mr. Kurland to

1 furnish copies of the discovery they had gotten from Mr. Harding  
2 to all other defense counsel. We've gotten a great deal of  
3 matters from them. There are a few items, and it's only a few  
4 out of the bulk of the items that I understand were provided,  
5 that Mr. Coburn and Kurland can't locate at this time. And we  
6 would just like to have them at this point.

7 I guess I could talk about it for a while but there's  
8 not, there's really not any else more to say.

9 THE COURT: You don't need to. Mr. Harding, remind me  
10 when the government intends to produce Jencks and Giglio.

11 MR. HARDING: I think it's a month before trial, Your  
12 Honor.

13 THE COURT: A month before. All right. I'm satisfied  
14 with that. I think it's certainly not what the defense would  
15 prefer, but I think that's reasonable.

16 MR. CROWE: Your Honor, the other matter --

17 THE COURT: And they still might find it, right?

18 MR. COBURN: We'll look again, Your Honor.

19 THE COURT: Well, I don't want you to look, I want you  
20 to find it. No, I appreciate, Mr. Coburn. I'm aware that Mr.  
21 Coburn's office has moved a couple of times, I think, since I got  
22 involved in this case. Okay.

23 MR. CROWE: The other matter is much more substantive  
24 and much more important. I think the Court's certainly aware of  
25 the circumstances behind what I guess people have been calling

1 misdirected voice mail. Our understanding is that there was a,  
2 is that in 2002 there was a very chaotic process where members  
3 and friends of the Wyche family listened to a message which had  
4 been, which had been transmitted. Our understanding is that they  
5 did that without law enforcement people there, and that they  
6 talked it over and that eventually there were a number of  
7 identifications made.

8 Our investigator has made some very, very serious  
9 attempts to try to locate, I think --

10 THE COURT: I'm sorry, Mr. Crowe. Let me see if I can  
11 abbreviate this.

12 MR. CROWE: Sure.

13 THE COURT: My understanding is that the government  
14 still isn't certain who they will rely, who the government will  
15 rely on for these identifications.

16 MR. CROWE: That's what they say, yes, Your Honor.

17 THE COURT: And it's May. And I appreciate Mr.  
18 Harding's observation that the assistants and the agents are  
19 involved in other cases. So I don't want to be, you know,  
20 unreasonable. Certainly, before the June 13th proceeding I will  
21 expect the government to have provided a strong preliminary  
22 indication of who the government expects to use. Okay?

23 So clearly -- I appreciate your memorandum, by the way.  
24 Of course, admissibility of identification evidence is a matter  
25 of concern for trial. And it's a trial right and I appreciate

1 that. And of course state action isn't required in the normal  
2 sense in which we think of state action.

3 And you're absolutely right. And we all know that the  
4 focus is on reliability. The difference, one difference is that  
5 when you got family members after a murder playing a tape over  
6 and over and over and over again, trying to identify voices, that  
7 is, in fact, a different situation than the situation you have if  
8 you have a law enforcement officer playing it over and over and  
9 over again.

10 So there is a difference in that sense. It's not a  
11 difference. I agree with the defense position that reliability  
12 is the linchpin, of course. That's what the Supreme Court has  
13 told us.

14 Now, I don't know what else I can say about that.  
15 Hopefully sooner rather than later the government's going to be  
16 able to say to you, here are the three people who we can say will  
17 positively identify Mr. Martin's voice on that voice mail, or the  
18 two people, or the four people, whatever it is. And hopefully  
19 the government, I assume the government will be able to provide  
20 you with 302's or whatever they have regarding the etiology, if  
21 you will, of those identifications.

22 But I'm not going to expect the government -- I'm going  
23 to be very clear about this -- I'm not going to expect the  
24 government to go back and try to identify everybody who came to  
25 that house the morning after the murders, and the 4 people or 12

1 people or the 27 people who were present, you know, for the 7  
2 hours of replaying it over and over again before law enforcement  
3 got involved. I'm not going to put that burden on the  
4 government.

5 The government doesn't have to discover suggestiveness.  
6 The government has a Brady obligation, obviously. And the  
7 government has a responsibility to insure that only reliable  
8 evidence is admitted, is offered and admitted for trial. But  
9 there's a limit to what the government's going to be required to  
10 do.

11 And I'm not suggesting, I don't mean to suggest that  
12 you're even suggesting that I should impose that kind of  
13 obligation on the government. But the truth of the matter is,  
14 under the circumstances there's going to be some stuff, I'm  
15 pretty sure there's going to be some stuff that's beyond the  
16 reach of the defense from what we see in a normal bank robbery.  
17 You know? The agent shows up within two minutes and within a  
18 couple of days there are photo arrays and the identification  
19 process is just pristine and recorded and all that.

20 We don't have that here. We've got voice recordings.  
21 Who knows who listened to them? Who knows who talked about it?  
22 And I don't think the government has an obligation to conduct  
23 that kind of investigation.

24 So again, I promise you you will have every reasonable  
25 opportunity, one, to get whatever the government's got, whatever

1 the government's got, and two, fully to cross examine any witness  
2 identified by the government or discovered by the defense on this  
3 issue. But the government doesn't have an obligation to find the  
4 address of Cousin Somebody who came to the house the day after  
5 the murder and was present when, when that voice mail was played.

6 So I don't think I can be any more, any more clear than  
7 that. You'll get what the government has. But as of this  
8 moment, I don't see any requirement on the part of the government  
9 to conduct any further investigation.

10 Again, I don't mean to suggest that you're asking the  
11 Court to order the government to conduct any further  
12 investigation. But if Mr. Harding doesn't, if he's got a name of  
13 somebody who may have been present without law enforcement,  
14 listening to this tape, and he doesn't know where the person is,  
15 I'm not requiring him to send some agent out looking for this  
16 person just so Mr. Harding can find out whether he was present  
17 when other people were present, who might have been present, who  
18 might have listened to the tape, and who may have formed an  
19 opinion about who was on the tape. So there are limitations.  
20 That's all.

21 I said I was going to abbreviate it. I probably  
22 prolonged it. But go ahead and respond.

23 MR. CROWE: Let me just make a couple of points.

24 THE COURT: Okay.

25 MR. CROWE: We expect that this was a process which was



1 very, very much contaminated.

2 In my experience, whenever there have been questionable  
3 identification procedures, the government has usually revealed to  
4 the defense the reasons why, you know, the problems with the  
5 identification as part of a Brady, as part of a Brady process. I  
6 would certainly expect that the government, when it is  
7 interviewing its witnesses, would be under an obligation to make  
8 inquiries about, you know, who was there, who did you, who did  
9 you talk to beforehand, did anybody identify anybody else. These  
10 are not matters that they can turn blind eye to. That if their  
11 inquiries do produce information of that sort, that it would be  
12 information which they would be required, that they would be  
13 required to pass on to us. And indeed, they would be required to  
14 pass on to us in sufficient time that we would be able to go out  
15 and make whatever efforts we could to try to find some of these  
16 people and have them here for the hearing, which I guess I now  
17 understand is going to take place on, is going to take place on  
18 June 12th.

19 I just don't think --

20 THE COURT: Or maybe not until August 22nd.

21 MR. CROWE: Well, Your Honor, if we want to subpoena  
22 somebody, I mean, we have to, I mean, we can't come in on June  
23 12th and be told this is the date for the hearing. We really  
24 need a fixed date for this hearing.

25 THE COURT: Well, either June 12th, June 13th, or

1 August 22nd.

2 MR. CROWE: Okay.

3 THE COURT: Now, if you want to issue a subpoena for  
4 June 12th, you can do that. I authorize you to do that.

5 Assuming the witness shows up, I'll address the witness and  
6 indicate that, if we're not ready for the witness on June 12th,  
7 that the witness is bound by the subpoena, and so forth.

8 MR. CROWE: But I am saying that I understand that it  
9 is the government's burden, when it does interview these  
10 eyewitnesses, or rather interview these people who listened to  
11 the tape, to try to find out from them the circumstances under  
12 which their identification and other identifications were made.

13 THE COURT: See, I'm very nervous, I'm very nervous  
14 with that assertion. There's a very large part of that assertion  
15 that I agree with and there's a part of that assertion that I  
16 don't agree with. And I'm not going to get into, I don't think  
17 I'm going to be drawn into a dispute over or relating to what  
18 questions a government agent or a prosecutor asked a witness  
19 under these circumstances. I mean, you know, how do you know  
20 it's his voice? Did anybody tell you that it was his voice or  
21 are you making that judgment based on your own personal  
22 knowledge? I'm not sure a government prosecutor has to ask a  
23 witness any more than that.

24 I don't think a government prosecutor has to cross  
25 examine a witness under these circumstances. And again, I keep

1 saying "under these circumstances" because we're not talking  
2 about a bank robbery. You know, this is sui generis.

3 So again, I agree with you, I disagree with you.  
4 Government knows its Brady obligations. But I don't know that  
5 the government has an obligation to conduct an independent  
6 investigation for Brady information.

7 MR. CROWE: I don't believe that they can turn a blind  
8 eye to the obvious, either.

9 THE COURT: I agree with that part of it. I absolutely  
10 agree with it. The difference between us, I think, if there is  
11 any difference, is where you draw that line. What is turning a  
12 blind eye as opposed to, yeah, it was a chaotic situation, the  
13 poor lady's son had just been murdered, and there's this evidence  
14 that comes out of nowhere, and family and friends and neighbors  
15 are interested and curious and want to play investigator. People  
16 talk, you know.

17 I mean, it's not much different than, you know, you got  
18 5 people standing on the corner and somebody shoots somebody and  
19 then it's 15 minutes before the police arrive. And in that  
20 period of time, you know, those five people are talking to each  
21 other and testing each other's memory and vision. And two of  
22 them walk away and the police never even find out they were  
23 there. And three of them are taken down to Homicide. It is  
24 really no different from that.

25 MR. CROWE: Well, it's a little bit different because

1 now we're six and a half years removed from what happened.  
2 Memories have faded. The type of witnesses that we're talking  
3 about, I think, are extraordinarily hard to locate. There is a  
4 difference because of the passage of time.

5 A second thing we asked for was that the government  
6 submitted to us an expert report from Mr. Nakasone, who was an  
7 FBI voice expert.

8 THE COURT: Voice expert or technical person?

9 MR. CROWE: Voice expert. This is a man who does what  
10 they call spectrographic analysis, where they basically put the,  
11 put the tapes on a machine and, they do all sorts of technical  
12 stuff. A lot of people say from that you can get, you can get  
13 evidence which will either identify somebody or eliminate  
14 somebody as a speaker.

15 I think the Bureau's practice is that they only use  
16 that for purposes of investigative leads. I think that's the  
17 Justice Department policy.

18 In any event, this man said that, this man, who's an  
19 expert at this stuff, said the quality of this tape is so bad  
20 that it's simply not something we can use for, something we could  
21 use to try to identify somebody, even for an investigative  
22 purpose. Moreover, he said, in listening to it, it appears that  
23 there are two, and maybe more, people on the tape.

24 What I am suggesting to the Court is that this shows  
25 that, indeed, the witnesses' opportunity to observe, which is, I

1 think, the first of the Neil v. Biggers factor, which don't  
2 really fit this case, but this one does, was probably  
3 extraordinarily poor.

4 We have asked the government if it would have Mr.  
5 Nakasone present at the time when the hearing was held, to avoid  
6 going through all of the procedures.

7 THE COURT: Can't you use his report? I'm sorry to cut  
8 you off. That's what his report says.

9 MR. CROWE: Yes, we can use the report. But we would  
10 like to have the man here because I expect he knows a great deal  
11 more than is in his report.

12 We're just asking the government to agree to have him  
13 here so that we don't have to jump through all the hurdles and,  
14 by the way, also charge the Court for jumping through all the  
15 hurdles.

16 THE COURT: Right.

17 MR. CROWE: As I said, that's not something Mr. Harding  
18 has to do, but we would just ask as a matter of courtesy if he  
19 can do it.

20 THE COURT: Sure. In other words, you might want to  
21 use him as a defense witness, in fact.

22 MR. CROWE: Yeah.

23 THE COURT: Okay. All right. I mean at the trial,  
24 even.

25 MR. CROWE: Certainly could happen.

1 THE COURT: Okay.

2 MR. CROWE: We'd like to have him here at the hearing  
3 because the, you know, the ability to observe is important. And  
4 I think, my guess is he can shed a fair amount of light how bad  
5 this tape is.

6 THE COURT: Perhaps he can be prevailed upon to even  
7 prepare a supplemental report. I'll ask Mr. Harding when he,  
8 when he speaks.

9 Anybody else on these issues, these issues of voice  
10 identification? Everybody joins in, I understand. There's a  
11 joinder essentially in all of it. But if there's anything more  
12 discrete than that.

13 MR. MARTIN: Your Honor, maybe I'm confused. We're  
14 going to hear these on June 12th? Because I'm trying to figure  
15 out what we really are going to hear, what we're going to do on  
16 June 12th.

17 THE COURT: Well, I was going to say before we broke,  
18 actually, we're going to hear everything. I'm hoping counsel  
19 will submit to me within the next few days or, certainly, within  
20 the next week your list, each counsel's individual list of the  
21 remaining issues.

22 MR. MARTIN: I think you've satisfied all my issues.

23 THE COURT: Okay.

24 MR. MARTIN: And the reason I'm telling you that, Your  
25 Honor, is I think I did something you're not going to be happy

1 with. But I agreed to speak at the State Bar on Friday the 13th.

2 THE COURT: Yeah. That's right.

3 MR. MARTIN: It's the State Bar. I had agreed to do  
4 this. Professor Warnken asked me to come down and speak on the  
5 program. I thought, like all the other hearings we've had in  
6 this case, we scheduled two days but we only used one, so I'd be  
7 all right.

8 THE COURT: Well, as I said, I actually have an  
9 emerging problem for the 14th, so it may be that --

10 MR. MARTIN: The 13th, whatever it is. Whatever that  
11 Friday morning is.

12 THE COURT: Friday is the 14th. Maybe we won't need  
13 two days, frankly.

14 MR. MARTIN: We're scheduled for the 13th and the 14th?

15 THE COURT: We're scheduled for the 13th and 14th but  
16 we also have August 22nd.

17 MR. COBURN: I think it's the 12th and 13th.

18 MR. MARTIN: It's the 12th and 13th, Your Honor.

19 THE COURT: I'm sorry. Is the 13th Friday?

20 MR. MARTIN: Yes.

21 THE COURT: I'm sorry.

22 MR. MARTIN: The 13th is the day I'm speaking.

23 THE COURT: I'm sorry. 12th and 13th.

24 MR. MARTIN: If we don't finish, Mr. Flannery could be  
25 here. I'm sure that would be okay with the Court.

1           THE COURT: Absolutely. Absolutely. Thank you, Mr.  
2 Martin. Ms. Rhodes.

3           MS. RHODES: Your Honor, I have to respectfully ask the  
4 Court to reconsider its decision on the Brady, rather Jencks and  
5 Giglio materials. I provided the court clerk with a list, which  
6 was what we had gleaned from what Mr. Harding had provided Mr.  
7 Coburn and Mr. Kurland a long time ago.

8           And in speaking with Mr. Harding this morning, he said  
9 at one point, I can't give you the items because I can't put the  
10 witnesses in jeopardy. But the fact of the matter is the  
11 witnesses are identified here. In fact, there's only, I think,  
12 three witnesses that, whose testimony or whose documents are at  
13 issue here. And one of them he mentioned this morning, who is  
14 Mark Herbert. We've known about him, TM, for a while, anyway,  
15 because he's in the lyrics.

16           The other is listed as Damita Green grand jury  
17 testimony which we, is a document we don't have, and Ernest  
18 Reynolds's documents, proffer session and things like that.

19           If we know who the witnesses are and we know they're  
20 saying things that aren't favorable to us, then they're  
21 identified for purposes, for those purposes. So I don't see what  
22 the additional danger would be in his actually providing those  
23 documents to us.

24           The other items are things like a CD of photos showing  
25 guns, a 911 tape. And I'm not sure why those aren't



1 discoverable, anyway.

2 As was mentioned just a minute ago, what we have to go  
3 through, we could try to subpoena the KGA tape and we can, you  
4 know, have a bunch, a flurry of letters with Mr. Harding back and  
5 forth on the photos about the gun. And there's two pages missing  
6 from some other documents. It just seems like it's extraordinary  
7 effort for us to go through to try to get this as soon as  
8 possible when it's not necessary.

9 We're under the gun time-wise --

10 THE COURT: Wait. Let me see if I'm following. This  
11 is about the stuff that Mr. Coburn and Mr. Kurland has lost?

12 MS. RHODES: Yes.

13 THE COURT: Is that what you're addressing?

14 MS. RHODES: Yes.

15 THE COURT: Okay. That's on Mr. Coburn and Mr.  
16 Kurland. I'm not going to visit on the government -- I'm sorry.  
17 I'm just not going to require the government to go back and do a  
18 do-over, with all respect to Mr. Coburn and Mr. Kurland.

19 MS. RHODES: Well, Your Honor, I don't think it is a  
20 do-over. They're going to have to give this to us, anyway.

21 THE COURT: In accordance with the discovery agreement  
22 and the rules and statutes.

23 MS. RHODES: Right. But I'm saying the rule doesn't  
24 make sense now because we have the identities.

25 THE COURT: What do you mean the rule doesn't make

1 sense?

2 MS. RHODES: I mean, their interest in protecting  
3 witnesses' safety doesn't apply now because we know the  
4 witnesses. They're identified here.

5 THE COURT: I couldn't disagree more. I mean, I think  
6 the government's interest in protecting witness safety actually  
7 follows the trial.

8 MS. RHODES: I'm not sure what the Court means.

9 THE COURT: Think about it. I'm not, I'm not getting  
10 into this discovery dispute.

11 I think, with all respect, I gave the defense something  
12 that they weren't, strictly speaking, entitled to. I ordered Mr.  
13 Kurland and Mr. Coburn to make production. They could have even  
14 objected to it, frankly. I think more than just trivial  
15 arguments could have been made. No, Judge, we don't have to make  
16 production to the other defendants, there's adversity here. And  
17 so the fortuity of the severance that became the non-severance  
18 and all of that, I'm sorry. I'm sure Mr. Coburn meant every word  
19 he said a few minutes ago when he said he's continuing to look  
20 for it and when he finds it he's going to turn it over. But I'm  
21 not going to require the government now to step in and do what  
22 Mr. Kurland and Mr. Coburn were ordered to do.

23 MS. RHODES: Very well, Your Honor.

24 THE COURT: All right. Anybody else? Mr. Kurland.

25 MR. KURLAND: I have a point on a different matter.

1 THE COURT: Yes. Yes.

2 MR. KURLAND: Your Honor, I'll probably avail myself of  
3 the opportunity to file an additional short pleading based on  
4 what you said a couple minutes ago.

5 I just want, as a point of clarification. Mr. Harding  
6 made reference to a pleading that we filed over a couple years  
7 ago with respect to some of the issues with respect to the rap  
8 lyrics, and in citing a case which dealt with communications of  
9 third parties. Just as a point of clarification.

10 I understand the Court's preliminary ruling with  
11 respect to those matters. But again, as a matter of the  
12 evidentiary requirements under the coconspirators, the  
13 coconspirator exception, the point of the statements have to be  
14 in furtherance of the conspiracy. Mr. Harding's proffer  
15 notwithstanding, there is still the outstanding factual issue as  
16 to whether or not what particular lyrics were, in fact,  
17 communicated to third parties.

18 So as far as I'm concerned, that still is an open  
19 question, that factually the government still has to prove by a  
20 preponderance of the evidence to meet the evidentiary exception  
21 that these lyrics were, in fact, communicated to third parties.  
22 And the Court's hypothetical about putting up a billboard on  
23 I-83, there's no evidence yet other than Mr. Harding's proffer  
24 that these things were, in fact, communicated to third parties.  
25 If that isn't established, then that's obviously an evidentiary

1 issue that the Court would have to deal with at the time.

2 I mean, we have the lyrics. We have the hard copies of  
3 the lyrics, so on and so forth. But unless there's proof by a  
4 preponderance of the evidence that it's been communicated, that's  
5 still out there, as far as I'm concerned.

6 I can tell by the Court's look on his face that there  
7 might be a --

8 THE COURT: No. No. I love the mental pathways you  
9 take me down, Mr. Kurland. I absolutely -- I'm thinking, what if  
10 a conspirator has a dream and the conspirator communicates the  
11 dream, and the dream is in furtherance of the conspiracy? And so  
12 the question that arises in my head is, to whom would the  
13 conspirator have to disclose the existence of the dream for it to  
14 be admissible? Don't try to answer that.

15 MR. KURLAND: No.

16 THE COURT: Don't even try. Don't even try. No,  
17 really. Your point, your point is that if Mr. Harris -- first of  
18 all, wait a minute. Wait a minute.

19 The thing has been recorded.

20 MR. KURLAND: Yes.

21 THE COURT: The government didn't produce the  
22 recording. It's been recorded. So at least the engineer who was  
23 present, it's been communicated to the engineer.

24 MR. KURLAND: That is correct, Your Honor. But again,  
25 given the government's very helpful outline of the four theories

1 of solidarity or intimidation, presumably, the engineer wasn't  
2 intimidated.

3 THE COURT: No. It doesn't, doesn't require that the  
4 government show that somebody was actually intimidated.

5 MR. KURLAND: No. But it has to be, but they do have  
6 to show that the statements were made in course of and in  
7 furtherance of. We had this same discussion, I think, a couple  
8 of years ago. I just wanted to make it clear that while the  
9 existence of the tapes and the transcripts are a given, the fact  
10 that a particular statement -- and I listened carefully to the  
11 Court's comments with regard to that, but it still remains, it  
12 still has to be shown almost on a case-by-case basis as to were  
13 these statements actually communicated in a manner that was in  
14 furtherance of the conspiracy? And I understand the Court's --

15 THE COURT: I think, I'm not going to rule finally now.  
16 I'm going to look at your arguments, your written arguments. But  
17 the production of the song itself is in furtherance of the  
18 conspiracy.

19 The government's theory, in part, is that the songs  
20 were written, that the CD was produced, and the government says  
21 offered for sale. All of that is a part of communicating.

22 MR. KURLAND: True. But again, I would like to see the  
23 witness who actually testifies that these things were offered for  
24 sale.

25 I understand. If the government's proffer is

1 established, then the legal requisites will be met. But again --

2 THE COURT: No. I agree with you. If the evidence  
3 were to come out that Mr. Harris wrote the lyrics, other  
4 coconspirators provided the music, and other coconspirators  
5 served the engineering function, and everybody who was in the  
6 studio at the time the CD was produced was a conspirator, all  
7 right, and they produced 500 of these things and they're sitting  
8 in a box somewhere, and then law enforcement, you know, swoops  
9 in. So the CD's been written, produced, boxed up, ready for  
10 sale, but never actually went into the stream of commerce, I  
11 think you'd have a really interesting question. And I see your  
12 point.

13 MR. KURLAND: No.

14 THE COURT: Would the CD then be admissible, because --

15 MR. KURLAND: I'm just keeping open the possibility. I  
16 mean, it reminds me when I was a prosecutor a lifetime ago. I  
17 had a case with bootleg phono records. That's exactly what they  
18 were. They were just boxes sitting around.

19 THE COURT: It's like my dream, it's like the dream.  
20 If it's a dream, can it really be in furtherance of the  
21 conspiracy?

22 MR. KURLAND: I think the whole Dallas show was based  
23 on that.

24 (Laughter.)

25 MR. KURLAND: The other point, Judge, has to do with,

1 and I'm actually fairly familiar with the, with the case law that  
2 goes in all directions on the 701 and 702 issue. I am just  
3 amplifying what I had said earlier.

4 If the interpretation of the lyrics are self-evident,  
5 they're certainly, and that's the Court's, not the Court's,  
6 that's Mr. Harding's own interpretation of some of them, there's  
7 going to be a real issue under 701 as to whether or not that's  
8 just oath helping and whether or not there needs to be any  
9 opinion testimony to amplify what is, of course, self-evident.

10 THE COURT: I think I was clear that part of it is  
11 quite self-evident, but other parts of it, you know, is not  
12 self-evident.

13 MR. KURLAND: The other point is particularly with  
14 respect to what the law enforcement official might say.

15 THE COURT: I don't think the government's going to  
16 have a law enforcement official.

17 MR. KURLAND: But again, there's some complicated  
18 issues as to whether or not --

19 THE COURT: I mean, a law enforcement official could  
20 come in and say, for example, yes, in the Park Heights community,  
21 Woodland Avenue is known as the Strip. A law enforcement officer  
22 with experience in that area of Baltimore, who's investigated  
23 drug activity, etc., etc., certainly could come in and say -- it  
24 wouldn't even be opinion testimony, it would be personal  
25 knowledge.

1           MR. KURLAND: So you're saying it would be the Court's  
2 ruling on that, that that is not expert testimony?

3           THE COURT: That's not expert testimony. Of course  
4 not. Of course not. A law enforcement officer could come in and  
5 talk about what Park Heights is, as could a non-law enforcement  
6 officer.

7           A law enforcement officer -- now, you could get into,  
8 with respect to the question of brick, what is a brick? Now  
9 we're getting into perhaps expert testimony. Okay?

10          MR. KURLAND: And with respect to those types of  
11 things, I mean, it's not self-evident to me that the government's  
12 going to simply be able to get all that in that in through lay  
13 opinion testimony.

14          THE COURT: Absolutely. Absolutely. We're absolutely  
15 in agreement on that.

16          MR. KURLAND: Thank you very much, Your Honor.

17          THE COURT: To a certain extent it's word by word,  
18 phrase by phrase and so forth. Thank you.

19          MR. KURLAND: Thank you, Judge.

20          THE COURT: All right. Anything else from anybody  
21 else?

22          I really -- oh, Mr. Harding, I need to give you a final  
23 opportunity.

24          MR. HARDING: I want to raise one -- first of all, I  
25 will undertake, as the Court directed, to provide a strong



1 preliminary indication as to who it will use, who the government  
2 will use for identification.

3 THE COURT: Thank you, Mr. Harding. And please try to  
4 do that by June 7th at the latest.

5 MR. HARDING: Okay. Another issue has come up fairly  
6 recently, Your Honor, which the agent has called to my attention.  
7 There was produced a few months ago something called the Stop  
8 Snitching Two video, which I have seen and which features at one  
9 point the main narrator of the video, who's a guy named Skinny  
10 Shug, holding up a --

11 THE COURT: Skinny, S-K-I-N-N-Y. Shug, S-H-U-G?

12 AGENT BENSON: Yes, Your Honor.

13 MR. HARDING: Yes. The agent indicates that Your Honor  
14 has spelled his name correctly.

15 THE COURT: All right.

16 MR. HARDING: He holds up a cell phone. And the  
17 voices, there are two voices that come over the cell phone. They  
18 complain about people who are ratting on the Down. They actually  
19 use -- do they use the word "Shake Down?"

20 AGENT BENSON: Both.

21 MR. HARDING: Both Down and Shake Down. They then  
22 condemn as rats, basically, three of the grand jury witnesses in  
23 this case who are named.

24 THE COURT: In the video?

25 MR. HARDING: In the video, yes. Will Montgomery,

1 Darryl Bacon, and Tony Montana, this guy Mark Herbert, who comes  
2 up in these songs. All three of them testified in the grand jury  
3 and defense counsel are well aware of it because the grand jury  
4 transcripts were turned over.

5 So we, the other day, played the Stop Snitching video  
6 for one of our cooperators and he positively identified Mr.  
7 Harris as one of the persons making this little statement. The  
8 agent has the actual clip from the video on his iPod and could  
9 play it for the Court if the Court wants to hear it.

10 But I anticipate that, this is indicative of the  
11 ongoing effort by these defendants to intimidate the witnesses  
12 and to put them at risk because these witnesses are moving in  
13 circles where rats are not viewed with favor, snitches are  
14 regularly subjected to all sorts of punishment in our society,  
15 and especially in our institutions of incarceration.

16 And so --

17 THE COURT: So are you suggesting, Mr. Harding, that  
18 sometime while he's been in custody in this case --

19 MR. HARDING: Yes, Your Honor.

20 THE COURT: -- somebody was able to make a recording of  
21 Mr. Harris's participation in this production?

22 MR. HARDING: What happened was, I believe, Your Honor,  
23 cell phones are easily available at Supermax. Mr. Harris and  
24 another person who we believe we have identified, but whom we  
25 have not definitely identified at this point, called Skinny Shug

1 probably by prearrangement so that it would be recorded on the  
2 videotape. Skinny Shug is actually depicted holding up the cell  
3 phone. And we hear, then, the voices coming over the cell phone.

4 Obviously, it seems Mr. -- in fact, they say that it's  
5 from Supermax. Isn't that correct? The call is --

6 THE COURT: Can you get me a copy, please, of --

7 MR. HARDING: The whole video?

8 THE COURT: Yes.

9 MR. HARDING: Yes, we can do that.

10 THE COURT: All right. Send a copy to me. Obviously,  
11 this is something we'll have to take up at the June hearing.

12 MR. HARDING: Okay. Thank you, Your Honor.

13 MR. MARTIN: Your Honor, assuming --

14 THE COURT: Is this the first you're hearing of this,  
15 Mr. Martin?

16 MR. MARTIN: Well, I heard about it a few minutes ago  
17 from the agent. But assuming that he's giving, whatever he's  
18 giving to you, we would like copies of, Your Honor.

19 THE COURT: Yes. Can you provide Mr. Martin --

20 MR. HARDING: Sure, Your Honor.

21 MR. KURLAND: All defense counsel.

22 MR. HARDING: Yes.

23 THE COURT: All right. Thank you.

24 All right, counsel. Please let me have within a week  
25 just a short list from each of you of your remaining issues. And

1 we'll get focused.

2 Thank you very much.

3 MR. MARTIN: Thank you, Your Honor.

4 THE COURT: We're in recess.

5 (Conclusion of Proceedings at 12:57 p.m.)

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REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of USA v. Willie Mitchell, et al., Case Number(s) AMD-04-029, on May 15, 2008.

I further certify that the foregoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In Witness Whereof, I have hereunto affixed my signature this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
Mary M. Zajac,  
Official Court Reporter

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